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Equitable Estoppel: Its Genesis, Development, and Application in Government Contracting. (EG)

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I. The Doctrine of Equitable Estoppel

A. Genesis & Development

The modern doctrine of equitable estoppel is an evolutionary product which owes its existence to several hundred years of legal development and refinement.[1] The word estoppel is derived from the french word "estoupe" and english word "stopped."[2] Its origins can be traced back to at least the twelfth century in medieval England.[3]

1. Estoppel by Record

The earliest form of estoppel was referred to as estoppel by matter of record. Estoppel by record rested upon the principle that matters solemnly recorded by the king's court had to be accepted as proof and could not be contradicted.[4] This principle was later extended to the ecclesiastical or common law courts.[5]

At first, estoppel by record was based upon the notion that producing the court record was itself a mode of proof.[6] By the 16th century, however, a more rational justification for estoppel by record existed. Specifically, it became clear that judicial proceedings could not go on forever. As one commentator noted:

> [W]ith the change in men's ideas as to the nature of a trial, it was coming to be thought that this species of estoppel[estoppel by record] was based, not so much upon the idea that the

production of the record is a mode of proof, but rather upon the idea, which was present to the mind of the Roman lawyers, that there ought to be a decent finality about the decisions of courts.[7]

Thus, during the Middle Ages, estoppel operated much like the modern day principle of res judicata.

The doctrine of estoppel, though, was hardly static and it continued to evolve over time. Estoppel by record gradually developed into estoppel by deed.[8]

2. Estoppel by Deed

Under estoppel by deed, a party in litigation could be bound by his prior written representations if they were signed under a seal.[9] Moreover, estoppel by deed was thought to be a natural development:

> [T]he legal value of the seal was the result of a practice working the above downwards, from the king to the people at large. It is involved in the beginning, with the Germanic principle that the king's word is indisputable... The king's seal to a document makes the truth of the document incontestable. This leads... to the modern doctrine of the verity of judicial records...for private men's documents, its significance is that the indisputability of a document sealed by the king marked it with an extraordinary quality, much to be sought after. As the habitual use of the seal extends downwards its valuable attributes go with it... this extension of the seal (from the king to private persons) begins in the eleventh and is completed by the thirteenth century.[10]

Important differences, however, existed between estoppel by record and estoppel by deed. For example, by

1584, parties in litigation could be estopped by a deed but only an estoppel by record could estop or bind a jury.[11]

More importantly, unlike estoppel by record, estoppel by deed was premised at least implicitly upon an act of the party to be estopped (i.e. signing a document with his seal).[12] Thus, under estoppel by deed, the focus of estoppel began to shift to the conduct of the party to be estopped. With this change in focus and meaning, estoppel soon acquired a new name--estoppel in pais.

3. Estoppel in Pais

In its early common law form, estoppel in pais was only applied to a select group of actions involving land over which the "pays" or "jury" could be expected to have cognizance. These actions included estoppel by livery, by entry, by acceptance of rent, by partition or by acceptance of an estate.[13] Indeed, many legal commentators were critical of the technical and somewhat rigid nature of estoppel during this period. Yet, these narrow forms of estoppel in pais greatly expanded under the law of equity. Indeed, by the nineteenth century, estoppel in pais had been applied in many other contexts and generally became known as equitable estoppel.[14]

4. Equitable Estoppel

The court's decision in Pickard v. Sears[15] layed the foundation for the development of equitable estoppel as we know it today. This case involved the common law action of trover in which the plaintiff argued that his machinery had been converted or sold without his permission. The defendants countered by arguing that a lawful sale of the plaintiff's machinery occurred. The defendants pointed out that the plaintiff had authorized a sale of his own goods by his actions. Adopting the defendants position, the court articulated the following definition of equitable estoppel:

> [W]here one by his words or conduct wilfully causes another to believe in the existence of a certain state of facts, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.[16]

This modern view of equitable estoppel was readily incorporated into the the law of torts. For example, one basic rule of torts states:

> If one person makes to another person a definite misrepresentation of fact concerning the ownership of property or its disposition, knowing that the other intends to act in reliance on it, and subsequently does an act or makes a refusal that would be tortious if the statement were true, the first person is subject to liability to the other as if the statement were true, provided that the other in reasonable reliance upon the statement has so changed his position that it would be inequitable to deny an action for the act or refusal.[17]

Equitable estoppel can also operate as a defense in tort actions:

> (1) If one person makes a definite

misrepresentation of fact to another person having reason to believe that the other will rely upon it and the other in reasonable reliance upon it does an act that would not constitute a tort if the misrepresentation were true, the first person is not entitled
(a) to maintain an action of tort against the other for the act, or
(b) to regain property or its value that the other acquired by the act, if the other in reliance upon the misrepresentation and before discovery of the truth has so changed his position that it would be unjust to deprive him of that which he thus acquired.
(2) If one realizes that another because of his mistaken belief of fact is about to do an act that would not be tortious if the facts were as the other believes them to be, he is not entitled to maintain an action of tort for the act if he could easily inform the other of his mistake but makes no effort to do so.[18]

Throughout the twentieth century, litigants utilized equitable estoppel to prevent parties from asserting defenses whether the underlying substantive law involved contracts, torts, property, or some other area of the law. Indeed, an oft cited definition reveals the breadth of equitable estoppel:

> Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy.[19]

Equitable estoppel, however, is not the only modern day species of estoppel. Another modern form of estoppel which developed in the nineteenth century is promissory estoppel.[20]

5. Promissory Estoppel

Promissory estoppel is a doctrine which has much in common with equitable estoppel. Specifically, both doctrines have roots in equity and reflect the aphorism that "he who has committed inequity shall not have equity."[21] Both concepts also require proof of detrimental reliance by the party asserting the estoppel. However, there is an important difference between the two doctrines. In particular, promissory estoppel is used to bind a party to a contract when consideration under the contract is lacking. Equitable estoppel, on the other hand, does not create a cause of action for the party employing it but is a litigative tool which prevents the party to be estopped from asserting certain defenses or rights.

Promissory estoppel has been defined as:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.[22]

Accordingly, the party asserting promissory estoppel must prove that he relied on a promise. Moreover, precatory comments and opinions do not normally constitute promises.[23] On the other hand, representations under equitable estoppel are generally representations as to a present or past fact.[24]

The doctrine of promissory estoppel has been primarily utilized by many courts to bind a private party under a contract even though the party received no consideration for his promise. For example, the court employed promissory estoppel in James King & Son, Inc. v. De Santis Construction No. 2 Corp..[25]

In this case a subcontractor submitted a telephonic bid to a general contractor who was bidding on a construction contract for Macy's Department Store. The subcontractor, however, withdrew his bid after the general contractor had used the bid and been awarded the contract. Therefore, the subcontractor never signed a contract with the general contractor. The general contractor, though, subsequently sued the subcontractor for the additional $44,000 cost of performance.

In its analysis of the case the court stated:

> The doctrine of promissory estoppel is intended to avoid the harsh results of allowing the promisor to repudiate, when the promisee has acted in reliance upon the promise...The court finds that defendant made a clear and unambiguous bid on which plaintiff relied, to its damage and that such reliance was reasonable and forseeable. The defendant, under the doctrine of promissory estoppel, is therefore liable for such damage.[26]

Thus, persons can assert a cause of action against a private party based on promissory estoppel because it is a substitute for the traditional requirement of consideration. One court has said: "[T]he doctrine of promissory estoppel...is not an estoppel and it is not a means of acceptance of an offer. We believe the better view is that it is "a substitute for consideration or an exception to the ordinary requirements."[27]

Equitable estoppel, on the other hand, precludes the party to be estopped from asserting certain claims or defenses under an existing express or implied in fact contract. Accordingly, equitable estoppel does not of itself create a cause of action in the party asserting it. Thus, equitable estoppel has commonly been said to operate as a "shield" and not as a "sword."[28]

The contract created under a promissory estoppel cause of action is a contract implied in law. It is not an express or implied in fact contract.[29] This distinction has important ramifications with regards to using promissory estoppel against the Government. Specifically, the doctrine of sovereign immunity acts as a formidable barrier to suits against the Government based on contracts implied in law.[30] This is because Congress has not waived sovereign immunity and allowed the Government to be sued on contracts implied in law.[31] Specifically, the Claims Court only has jurisdiction to hear disputes based on express or implied in fact contracts. As stated by the Claims Court:

> It is important to distinguish between the doctrine of equitable estoppel, which operates to prevent the denial of a contract that has been made, and the doctrine of promissory estoppel, which creates a contract that otherwise would not exist.[32]

Moreover, the boards of contract appeals do not have jurisdiction over implied in law contracts.[33] Indeed, the General Services Board of Contract Appeals has said:

> Under the Contract Disputes Act of 1978, this Board has jurisdiction to grant relief in matters relating to contracts, including implied contracts, concurrent wth the Claims Court...Since the jurisdition of the Claims Court is limited to contracts implied-in-fact,as opposed to contracts implied-in-law...our jurisdiction is likewise limited.[34]

In sum, while often utilized between purely private parties, promissory estoppel at present will probably not provide a contractor with a cause of action against the Government.[35]

B. Distinguished From Other Theories Used to Bind the Government

Equitable estoppel is not the only legal doctrine that can be used to bind the Government. In this section I will discuss two other legal principles used to bind the Government which are sometimes confused with equitable estoppel. These principles are called ratification and finality.

1. Ratification

Ratification is the adoption of an unauthorized act resulting in the act being given effect as if originally authorized.[36] The principle of ratification is commonly used to bind private parties.[37] The Government, however, can also be bound through ratification. Some courts and boards have relied on regulatory authority to bind the Government through ratification,[38] while other decisions have considered the authority to ratify as an essential component of an agent's authority without regard to statutory or regulatory coverage.[39]

Ratification can be an extremely powerful and useful tool in government contracting because commitments made by government employees without actual authority can subsequently be made binding through ratification. Ratification injects a measure of flexibility into government contracting. This flexibility is needed given the enormous size and activity of many government contracting activities.

Unfortunately, the recently published Federal Acquisition Regulation(FAR) provision on ratification significantly restricts the use of ratification in government contracts. Indeed, ratification may become an uncommon occurrence under the new FAR policy. Some of the more significant provisions in the new FAR policy include the following:

> (a) Definitions.
> "Ratification," as used in this subsection, means the act of approving an unauthorized commitment by an official who has authority to do so. "Unauthorized commitment," as used in this subsection, means an agreement that is not binding solely because the Government representative who made it lacked the authority

to enter into that agreement on behalf of the Government.
(b) Policy.
(1) Agencies should take positive action to preclude, to the maximum extent possible, the need for ratification actions. Although procedures are provided in this section for use in those cases where the ratification of an unauthorized commitment is necessary, these procedures may not be used in a manner that encourages such commitments being made by Government personnel. (2) Subject to the limitations in paragraph (c) of this subsection, the head of the contracting activity, unless a higher level official is designated by the agency, may ratify an unauthorized commitment.
(c) Limitations.
The authority in subparagraph (b)(2) of this subsection may be exercised only when-
(1) Supplies or services have been provided to and accepted by the Government, or the Government otherwise has obtained or will obtain a benefit resulting from performance of the unauthorized commitment;
(2) The ratifying official could have granted authority to enter or could have entered into a contractual commitment at the time it was made and still has the authority to do so; (3) The resulting contract would otherwise have been proper if made by a contracting officer.
(4) The contracting officer reviewing the unauthorized commitment determines the price to be fair and reasonable;
(5) The contracting officer recommends payment and legal counsel concurs in the recommendation, unless agency procedures expressly do not require such concurrence;
(6) Funds are available and were available at the time the unauthorized commitment was made; and
(7) The ratification is in accordance with any other limitations prescribed under agency procedures.[40]

Notwithstanding the above FAR guidance, one seeking to bind the Government through ratification must prove two essential elements. First, that the ratifying official had the authority to authorize the unauthorized act.[41] Secondly, that the ratifying official had knowledge, actual or constructive, of the unauthorized act.[42]

Ratification requires actual authority to bind the Government just like equitable estoppel. The main difference is that under ratification this authority is exercised by a government official after an unauthorized act has already taken place. Moreover, the Government cannot be bound by ratification unless it knows or should know about the unauthorized act which took place. Finally, the ratifying official normally expressly ratifies the unauthorized conduct although his silence can lead to a ratification of unauthorized government employee conduct.[43]

2. Finality

The term "finality" has been used to describe the binding effect government employee contractual actions have on the Government.[44] As with equitable estoppel, the principle of finality will only bind the Government when its employees have acted within the scope of their authority.[45] As noted by two commentators: "[T]he finality of contractual acts may attach as a result of either the application of a provision of the contract, which is interpreted as defining when finality attaches, or the operation of a legal rule."[46]

Accordingly, the principle of finality is distinct from equitable estoppel. Specifically, under finality, the Government binds itself pursuant to contract provisions and legal principles. On the other hand, justice and fair dealing support binding the Government through the application of equitable estoppel. Moreover, finality does not require detrimental reliance and the other basic elements associated with equitable estoppel. Unfortunately, numerous courts and boards have needlessly relied upon equitable estoppel to bind the Goverment in situations where the principle of finality should have been used.[47]

The principle of finality is implicated in numerous contractual clauses. One such clause states in part:

> Acceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract.[48]

Another pertinent clause is the Disputes Clause which says in part:

> The contracting officer's decision shall be final unless the Contractor appeals or files a suit as provided in the Act.[49]

Many times, however, a contract provision does not address the government employee's actions. In many of these cases it is the operation of a legal rule which binds the Government. Examples include acceptance of an offer and interpretation of a contract.

C. Basic Elements

While equitable estoppel can be a powerful litigative tool between private parties, it is commonly accepted that the Government cannot be estopped on the same terms as any private person.[50] This issue of sovereignty and equitable estoppel is fully treated in chapter two of this thesis. Moreover, chapter three discusses the need for actual authority on the part of government agents to estop the Government. The focus of this section, however, is on the basic elements of equitable estoppel. These essential elements must always be proven by the party asserting equitable estoppel. Indeed, it makes no difference whether the party to be estopped is the Government or a private person. As stated by the Supreme Court:

> [H]owever heavy the burden might be when an estoppel is asserted against the Government, the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present.[51]

Accordingly, in this section I will identify the essential elements of equitable estoppel and discuss some decisions where the elements have been applied.

Courts and boards have identified four fundamental elements which must always be present for a party to establish a prima facie case of equitable estoppel against the Government: 1) the Government must know the facts; 2) the Government must intend that its conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; 3) the party asserting the estoppel must be ignorant of the true facts; and 4) the party asserting the estoppel must rely on the

Government's conduct to its injury.[52]

The existence of equitable estoppel is a question of fact for the factfinder.[53] Moreover, it has been said that the party asserting equitable estoppel must prove her case with clear and convincing evidence.[54] One author has noted:

> [T]he general rule established by the authorities is that the proof "must be certain in every particular, with nothing left to mere intendment...."[55]

1. Government Knowledge of the Facts

In broad terms, equitable estoppel requires conduct which amounts to a false representation or concealment of material facts, or at least, which is calculated to give the impression that the facts are otherwise than those which the party subsequently attempts to assert.[56] Such a misrepresentation or concealment can be made by one's words, conduct, silence or acquiesence.[57]

To prove estoppel, a party must establish that the Government knew or should have known[58] the truth about the material fact which it misrepresented or concealed and upon which the party seeking estoppel relied to their detriment. As expressed by one author:

> One of the elements of equitable estoppel, as related to the party to be estopped, is broadly stated to be that he must have had knowledge, actual or constructive, of the real facts. More specifically, the general rule is that it is essential to the doctrine of equitable estoppel

> or estoppel in pais that the party sought to be estopped should have had knowledge of the facts or at least that he should have means at hand of knowing all the facts, or have been in such a position that he ought to have known them.[59]

One recent decision which discusses this knowledge element in the context of an estoppel involving the concealment of material facts is Rocky Mountain Trading Co..[60]

In this case the Department of Transportation(DOT) eliminated a contractor from the competitive range in a procurement for automatic data processing equipment(ADPE) because the contractor failed to submit a timely revised proposal to a contract amendment. The contractor, however, argued that its proposal was excusably late because its proposal was misdelivered due to an unknown verbal agreement between the United Parcel Service(UPS) and the Government. Under this agreement, all UPS deliveries were made to DOT's shipping and receiving center which was located in a different building from the delivery location specified in the solicitation for all proposals.

The board found for the contractor and estopped the Government from asserting that the contractor's revised proposal was late. With regards to the element of Government knowledge, the board held:

> [T]he respondent[Government] has made an arrangement with United Parcel Service to make all deliveries to the Transportation Systems Center's shipping and receiving facility, and it surely knows that those vendors which select United Parcel Service to deliver bids and proposals are unable to deliver those bids and

proposals directly to the depository for sealed offers...[61]

Accordingly, the material fact in Rocky Mountain Trading Co. which the Government knew yet failed to divulge was that contractors using UPS could not have their proposals delivered directly to the bid depository as required by the solicitation. The Government knew this because it had a delivery arrangement between itself and UPS. Estoppel was therefore appropriate because the contractor was also ignorant of this arrangement and relied upon it to his detriment.

On the other hand, the Government will not be estopped when it lacks knowledge of the material facts which it allegedly misrepresented or concealed. For example, in Chrysler Corp.,[62] a contractor argued that the Government should be estopped from disallowing certain commercial costs incurred at an off-site facility under a single burden accounting system because of its past acquiesence to the accounting systems and its failure to object to the system at contract negotiations.

The board, however, refused to estop the Government because it found that the Government's past acquiesence was based on certain beliefs. Specifically, the Government had only acquiesced to off-site facility costs involving administrative matters, the performance of small study contracts, and bid and proposal activities. Moreover, during contract negotiations, the Government did not know that the past character of the off-site work would change in the future to commercial production work involving seat belt analyzers. The board stated:

> However, at the time[time of negotiations], neither party had hard knowledge of the real facts that were later to transpire. The Appellant[contractor] was proceeding in hopeful anticipation. The Government had not been presented with data regarding start-up of a commercial production facility. It was not possible for the Appellant to disclose that which did not exist at the time.[63]

2. Government Intent or Expectation that Its Conduct Be Acted Upon

This second element requires that the Government intend that its conduct be acted on or act in a manner that the party asserting the estoppel could reasonably believe it so intended.[64] Thus, a party can satisfy this element without necessarily proving that the Government actually intended for its conduct to be acted upon. In fact, courts and boards apply an objective test in analyzing governmental conduct or statements. Specifically, governmental conduct must be of a character as would induce a reasonable and prudent person to believe that the Government intended its conduct to be acted upon.

In American Electronic Laboratories, Inc.,[65] the Federal Circuit Court of Appeals recently discussed this second element at length in a case where it ultimately decided to estop the Government from invoking a limitation of funds contract clause in the face of contract cost overruns. In its discussion of the second element, the court noted that "the second element is a question of expectation" in which "[t]he promisor must have had reason to expect the reliance that occured...The standard for testing expectation is an objective one, under which the promisor is bound if he had reason to expect reliance, even if he did not in fact expect it."[66]

3. Reliance

The party asserting estoppel must actually rely upon the conduct or statements of the Government.[67] One recent decision illustrating this point is P.J. Dick Contracting, Inc..[68]

In this case the Government tried to estop a contractor from denying that a price agreement had been reached with regards to a contract modification involving the foundation design for a postal facility. The Government argued that it approved the modification to the facility in reliance upon the price agreed to at the meeting. However, the facts apparently showed otherwise:

> Upon a review of the record, we find that the preponderance of the evidence establishes that Respondent[Government] decided to change the foundation design prior to the December 17, 1980 meeting. Therefore, we find the change[modification] was not made because of reliance upon Appellant's conduct at or after that meeting. With the element of detrimental reliance lacking, equitable estoppel cannot be found.[69]

A corollary to the actual reliance requirement is the proposition that "[a] party may not base a claim of estoppel in his favor upon his own dereliction of duty...."[70] This principle was plainly evidenced in the case of Lytle Co. v. Clark.[71]

In Lytle Co. a corporation tried to estop a state government agency from refusing to reissue a building permit for the completion of a resort lodge. The estoppel argument was premised on the fact that the Pitkin County, Colorado Board of County Commissioners had initially issued the corporation a building permit which the corporation viewed as a representation that the development could proceed to completion. The corporation, however, stopped construction before the project was completed and therefore stopped relying on the permit or representation. In its analysis, the court opined:

> At the time the building permit was issued, appellant's proposed condominium development was a proper use of the land. Appellant was authorized to, and did in fact, commence construction under the permit, completing only a portion of the total project. However, his subsequent 5-1/2 year delay in construction, coupled with the expiration of the permit and failure to communicate with appellees, negates application of the equitable estoppel doctrine...Had appellant continued construction it would have been permitted to complete the project, regardless of the change in the zoning laws. But equitable estoppel does not arise when the actions complained of are a result of the complainants own actions and not the product of the defendant's acts.[72]

It is also clear that the party seeking estoppel must reasonably rely on the Government's conduct or statements.[73] This requirement is really just another way of stating that the party seeking estoppel must be ignorant of the true facts.[74]

Often a party's reliance is considered unreasonable because of provisions in the underlying contract. For example, in Mercury Construction Corp.,[75] the Armed Services Board of Contract Appeals relied on two contract provisions in determining that there was no reasonable reliance by the party asserting estoppel against the Government. The contractor had argued that the Government was estopped to require the correction of a specification deviation because it had notice of the deviation for several months yet never objected. The board cited two contract clauses concerning inspection[76] and stated:

> Under these contract provisions appellant had no right to rely on Government inspection for correction of errors in the work while the work was underway...[t]o hold the Government estopped in these circumstances would shift to the Government the burden of assuring contractor compliance with specifications, while the work is being performed, contrary to General Provisions 10 and 32 and Special Provision 37...[77]

The reasonableness of a party's reliance is often measured by examining that party's experience. Moreover, the surrounding circumstances must also be considered. The Claims Court's decision in Glopak Corp.[78] illustrates this point.

In this case, the contractor, Glopak, sought to estop the Government from enforcing a downward contract price adjustment under an economic price adjustment clause because government employees stated that the clause was for its benefit and could not operate to its detriment. The court rejected the estoppel argument noting that Glopak's reliance on the statements was unreasonable. The court felt that the statements, in the context of the parties negotiations, only amounted to general commentary on the operation of the clause. The court also found that Glopak's reliance was not reasonable because of its past experience with the clause. The court held:

> A separate reason Glopak's reliance is unreasonable is that, even assuming the statement in question could be taken as something in the nature of a warranty that the clause could never reduce the contract price, Glopak knew better from its own experience. Again, Glopak was not ignorant of the purpose and operation of the clause, but rather was familiar with its operation from experience in a prior contract and, based upon this knowledge, tried to negotiate its removal. Plaintiff[Glopak] approached the contract with the clear understanding of the complexities and potential consequences of the clause and assumed the risk that unforseen difficulties could be encountered.[79]

The Supreme Court has recently suggested that reliance on oral statements of government employees might not be reasonable for purposes of estopping the Government. In Heckler v. Community Health Services of Crawford County,[80] the Court said:

> The appropriateness of respondent's reliance is further undermined because the advice it received from Travelers was oral. It is not merely the possibility of fraud that undermines our confidence in the reliability of official action that is not confirmed or evidenced by a written

> instrument. Written advice, like a written judicial opinion, requires its author to reflect about the nature of the advice that is given to the citizen, and subjects that advice to the possibility of review, criticism and reexamination. The necessity for ensuring that governmental agents stay within the lawful scope of their authority, and that those who seek public funds act with scrupulous exactitude, argues strongly for the conclusion that an estoppel cannot be erected on the basis of the oral advice that underlay respondent's cost reports.[81]

However, despite the Court's language in Heckler, courts and boards continue to hold that a contractor can reasonably rely on oral assurances given by government employees. One such example is Village Properties.[82] In Village Properties, a contractor had entered into a contract with the Chicago Regional Office of the Department of Housing and Urban Development(HUD) to clean and repair an apartment complex, reduce vandalism, and establish security around the complex. Unfortunately, numerous problems occurred during the performance of the contract. Accordingly, the contractor gave the Government notification that he intended to terminate the contract pursuant to a termination provision under the contract. The Government, however, wanted to keep the contractor on the job so they orally assured him at a meeting that he would be compensated at an increased contract price if he would stay on the job. In finding for the contractor the board held:

> Appellant's reliance on the actions of HUD officials was reasonable and to its detriment...We find as a matter of law that the

Government is estopped from recouping the alleged "overpayments" because of Appellant's reasonable reliance to its detriment on the Government's oral assurances and actions.[83]

4. Contractor Injury

Finally, a contractor must also prove that his reliance has caused him to suffer an injury.[84] Reliance alone will not suffice. As stated by one board: "A change in position, and resultant injury, consequent upon the action or inaction of the party to be charged is an essential element of equitable estoppel."[85] A party must establish that their reliance has placed them in a worse position than they would have been in otherwise.[86] Many courts and boards interpret this to mean that detriment cannot occur when a party is deprived of something which under the law it was never entitled to in the first place.[87]

An interesting application of this point occurred in Singer Co., Librascope Division v. United States.[88] In this case the contractor sought to estop the Government from denying that cost and pricing data were accurate, complete, and current because of the Government's alleged participation in a nonupdating accounting practice. The Court of Claims denied the estoppel claim and upheld the board's previous decision that the Government was entitled to a $227,755 price reduction. With regards to the element of detriment or injury the court opined:

> [W]here is the detriment? Plaintiff[Singer] did have to give back the $227,755. But that only placed it back into the position it should have been in to start with anyway. Had plaintiff disclosed as required by law, it would never have received the $227,755.[89]

Finally, a party must prove actual detriment or injury. It has been said that a supplier will "not be estopped on the mere supposition that the...contractor would have acted differently if he had known."[90]

Chapter One Footnotes

1. See e.g., J. Ewart, An Exposition of the Principles of Estoppel by Misrepresentation, at 1(1900); M. Bigelow, A Treatise on the Law of Estoppel and its Application in Practice, at 543(2d ed. 1876); 9 W. Holdsworth, A History of English Law, at 144(1926); 3 J. Pomeroy, Equity Jurisprudence Section 804, at 189(5th ed. 1941).

2. Coke, Upon Littleton Section 352a.

3. 9 W. Holdsworth, supra, at 145,147.

4. Id. at 147.

5. Id. at 148.

6. Id. at 148,149.

7. Id. at 149.

8. See generally J. Ewart, supra note 1; M. Bigelow, supra note 1; 9 W. Holdsworth, supra note 1.

9. 9 W. Holdsworth, supra note 1, at 154.

10. Id. at 154,155.

11. Id. at 157.

12. Id. at 158.

13. See e.g., 9 W. Holdsworth, supra note 1, at 159; J. Ewart, supra note 1, at 1.

14. E. Snell, Principles of Equity, at 626(1966).

15. Pickard v. Sears, 6 A. & E. 469(1837).

16. Id. at 474.

17. Restatement(Second) of Torts Section 872(1979).

18. Id. at Section 894.

19. 3 J. Pomeroy, supra note 1, Section 804, at 189. See also Suwannee River Fin.,Inc. v. United States, 7 Cl.Ct. 556,561(1985) where the court stated that equitable estoppel arose out of the law of contracts.

20. E. Snell, supra note 14, at 627.

21. 28 Am.Jur. 2d _Estoppel & Waiver_ Section 1(1966).

22. Restatement(Second) of Contracts Section 90(1981).

23. _See_ 28 Am.Jur. 2d _Estoppel & Waiver_ Section 48.

24. _See e.g._, 28 Am.Jur. 2d _Estoppel & Waiver_ Section 46; Campbell Co. v. Virginia Metal Indus.,Inc., 708 F.2d 930,932(4th Cir.1983).

25. James King & Son,Inc. v. De Santis Constr. No. 2 Corp., 97 Misc. 2d 1063, 413 N.Y.S. 2d 78(N.Y.Sup.,Dec 14,1977).

26. _Id._ at 97 Misc. 2d 1066,1067.

27. _In re_ Flying W. Airways,Inc., 341 F.Supp. 26,74(E.D.Penn. 1972).

28. _See e.g._, 28 Am.Jur. 2d _Estoppel & Waiver_ Section 33; Biagioli v. United States, 2 Cl.Ct. 304,307(1983).

29. _See_ Pacific Gas & Elec. Co. v. United States, 3 Cl.Ct. 329,340(1983).

30. _See e.g._, Optimal Data Corp., NASA BCA No. 381-2, 85-1 BCA 17759 at 88720; Jablon v. United States, 657 F.2d 1064,1069,1070(9th Cir.1981); Northern Indian Hous. & Dev. Council v. United States, 12 Cl.Ct. 417,424 n.3(1987).

31. _See e.g._, Metzger, Shadyac & Schwartz v. United States, 10 Cl.Ct. 107,110 n.2(1986); Hohri v. United States, 782 F.2d 227,243(D.C.Cir.1986); Pasternack v. United States, 12 Cl.Ct. 707,709(1987).

32. Pacific Gas & Elec. Co. v. United States, 3 Cl.Ct. 329,340(1983).

33. _See_ Optimal Data Corp., NASA BCA No. 381-2, 85-1 BCA 17759 at 88720.

34. Parking Co. of America, GSBCA No. 7654, 87-2 BCA 19823 at 100295.

35. Hoke Co. v. TVA, 661 F.Supp. 740,745,746(W.D.Ky.1987).

36. Restatement(Second) of Agency Section 82(1958).

37. J. Hynes, _Agency & Partnership_, at 301(2d ed.1974).

38. _See e.g._, Fish & Wildlife Serv., Comp.Gen.Dec.

B-208730, 83-1 CPD 75(1983) where the Comptroller General relied upon FPR 1-1.405 to support ratification.

39. See e.g., Driftwood of Ala., GSBCA No. 5429, 81-2 BCA 15169 at 75080(1981); Michael Guth, ASBCA No. 22663, 80-2 BCA 14572 at 71860(1980).

40. 48 C.F.R. 1.602-3(1988).

41. See e.g., Consortium Venture Corp. v. United States, 5 Cl.Ct. 47,51, aff'd 765 F.2d 163(Fed.Cir.1985).

42. See Tymshare, PSBCA No. 206, 76-2 BCA 12218 at 58810(1976).

43. See e.g., Brown Constr. Co., ASBCA No. 22648, 79-1 BCA 13745 at 67368; Triangle Elec.Mfg.Co., ASBCA No. 15995, 74-2 BCA 10783 at 51276. See also Norwood Precision Prods., ASBCA No. 24083, 80-1 BCA 14405 at 71025 for a case involving ratification by conduct.

44. J. Cibinic,Jr.,R. Nash,Jr., Formation of Government Contracts, at 92(2d ed.1986).

45. See e.g., Trevco Eng'g & Sales, VACAB No. 1021, 73-2 BCA 10096 at 47424,47425.

46. J. Cibinic,Jr.,R. Nash,Jr., supra, at 93.

47. See e.g., Lockheed Shipbuilding & Constr. Co., ASBCA No. 18460, 75-1 BCA 11246, mot. for reconsid. denied, 75-2 BCA 11566; H & M Moving,Inc. v. United States, 204 Ct.Cl. 696, 499 F.2d 660(1974).

48. 48 C.F.R. 52.246-2(1988). See also Z.A.N. Co., ASBCA No. 25488, 86-1 BCA 18612,93488.

49. 48 C.F.R. 52.233-1(1988).

50. See e.g., Heckler v. Community Health Servs. of Crawford County, 467 U.S. 51(1984).

51. Id. at 61.

52. See e.g., Rocky Mountain Trading Co., GSBCA No. 8671-P, 87-1 BCA 19406 at 98128.; Brechan Enters.,Inc. v. United States, 12 Cl.Ct. 545,549(1987); New Orleans Stevedoring Co., ASBCA No. 27132, 84-2 BCA 17413 at 86733; Excavation-Constr.,Inc., ENGBCA No. 4106, 86-1 BCA 18672 at 93906,93907; Evans v. United States, No.

58-85-C, Jan 26, 1988(Cl.Ct.); Moore Elec. Co., ASBCA No. 33828, 87-3 BCA 20039 at 101439.

53. United States ex rel. Cogifer v. Ins.Co. of North America, No. 86-183-NN(E.D.Va.Oct 15,1987); Tidewater Equip. Co. v. Reliance Ins. Co., 650 F.2d 503,506(4th Cir.1981).

54. Chrysler Credit Corp. v. First Nat'l Bank & Trust Co. of Washington, 746 F.2d 200,206(3rd Cir.1984).

55. 28 Am.Jur. 2d Estoppel & Waiver Section 148(1966).

56. Id. Section 35.

57. Id. Section 35.

58. See e.g., Morton v. Wharton, 514 F.2d 406,412(4th Cir.1975); Adriaenssens v. Allstate Ins. Co., 258 F.2d 888,891(10th Cir.1958).

59. 28 Am.Jur. 2d Estoppel & Waiver Section 40(1966).

60. Rocky Mountain Trading Co., GSBCA No. 8671-P, 87-1 BCA 19406.

61. Id. at 98128(emphasis added).

62. Chrysler Corp., NASA BCA No. 1075-10, 77-1 BCA 12482. See also Murdock Mach. & Eng'g Co. of Utah, ASBCA Nos. 20409,27860,28031,Slip Opinion,November 20,1987.

63. Chrysler Corp., NASA BCA No. 1075-10, 77-1 BCA 12482 at 60510.

64. It is clear that the party asserting estoppel need not establish fraud on the part of the party to be estopped. See e.g., United States v. Fidelity & Casualty Co. of New York, 402 F.2d 893,898(1968); United States ex rel. Cogifer v. Ins. Co. of North America, No. 86-183-NN(E.D.Va.Oct 15,1987).

65. American Elec. Laboratories Inc. v. United States, 774 F.2d 1110(Fed.Cir.1985).

66. Id. at 1115.

67. See e.g., SEC v. Blavin, 760 F.2d 706,712(6th Cir.1985). Indeed, one noted author has said:

> The truth concerning these material facts must be unknown to the other party claiming

the benefit of the estoppel, not only at the time of the conduct which amounts to a representation or concealment, but also at the time when the conduct is acted upon by him.

3 J. Pomeroy, supra, note 1, at 219. But see Loyal E. Campbell d.b.a. House of Typewriters, GSBCA No. 5954, 82-2 BCA 15916, mot. for reconsid. denied, 82-2 BCA 16038(1982).

68. P.J. Dick Contracting,Inc., PSBCA No. 992, 84-1 BCA 16992, mot. for reconsid. denied, 84-1 BCA 17218.

69. Id. at 85733.

70. See e.g., Birkelund v. United States, 142 F.Supp 459,465, 135 Ct.Cl. 503,513(1956); Dee Hong Lue v. United States, 280 F.2d 849,854(Ct.Cl.1960).

71. Lytle Co. v. Clark, 491 F.2d 834(10th Cir.1974).

72. Id. at 838.

73. See e.g., Moore Elec. Co.,Inc., ASBCA No. 33828, 87-3 BCA 20039 at 101439; Perpetual Bldg.Ltd. Partnership v. Dist. of Columbia, 618 F.Supp. 603,613,614(D.D.C.1985).

74. See e.g., United States ex rel. Cogifer v. Ins. Co. of North America, No. 86-183-NN(E.D.Va.Oct 15,1987); Glopak Corp. v. United States, 12 Cl.Ct. 96(1987); United States v. Fraser, 308 F.Supp. 557,564(D.Mont.1970); McDonnell Douglas Corp. v. United States, 222 Ct.Cl. 570(1980); Caramucci v. United States, 12 Cl.Ct. 263(1987); United States v. 49.01 Acres of Land, 802 F.2d 387,392(10th Cir.1986).

75. Mercury Constr. Corp., ASBCA No. 23156, 80-2 BCA 14668.

76. These two clauses were the Government Inspectors Clause(DAR 7-602.43) and the Inspection & Acceptance Clause(DAR 7-602.11).

77. Mercury Constr. Corp., ASBCA No. 23156, 80-2 BCA 14668 at 72340.

78. Glopak Corp., v. United States, 12 Cl.Ct. 96(1987).

79. Id. at 104.

80. Heckler v. Community Health Servs. of Crawford County, 467 U.S. 51(1984).

81. Id. at 65.

82. Village Properties, HUDBCA No. 85-962-C6, 87-2 BCA 19704. See also Huffman Lumber Co., AGBCA No. 85-208-1, 86-3 BCA 19027 at 96107.

83. Village Properties, HUDBCA No. 85-962-C6, 87-2 BCA 19704 at 99769.

84. See e.g., Simmonds Precision Prods. v. United States, 546 F.2d 886,892, 212 Ct.Cl. 305(1976); Cascade Pacific Int'l, GSBCA No. 6287, 83-1 BCA 16501 at 82004.

85. Hof Constr.,Inc., GSBCA No. 7027, 84-3 BCA 17571 at 87560.

86. See Chula Vista City School Dist. v. Bennett, 824 F.2d 1573,1583,1584(Fed.Cir.1987).

87. See e.g., Heckler v. Community Health Servs. of Crawford County, 467 U.S. 51,61; Leech v. Dole, 749 F.2d 331,337,338(6th Cir.1984); Monsour Medical Center v. Heckler, 806 F.2d 1185,1196(3rd.Cir.1986).

88. Singer Co., Librascope Div. v. United States, 576 F.2d 905(1978).

89. Id. at 917.

90. See e.g., United States v. Glassmann Constr. Co., 397 F.2d 8,11(4th Cir.1968)(emphasis added).

II. Sovereignty and Equitable Estoppel

A. Background

While the doctrine of equitable estoppel is frequently invoked in litigation between private parties,[1] an issue often arises as to whether the Government can be equitably estopped in view of its sovereign status. Government contractors, however, have been successful in using equitable estoppel as a litigative device to estop the Government from asserting certain claims or defenses.[2]

At present, courts use two separately identified approaches in deciding whether to estop the Government from asserting a claim or defense in litigation. One such approach, currently used by several courts, the Comptroller General, and boards of contract appeals, is called the sovereign/proprietary distinction. Under this analytical model, the Government can be estopped from asserting a claim or defense when it acts in its proprietary or commercial capacity but not when it functions in its sovereign capacity. This approach stems from the notion that the Government should be treated like a private party when it enters the commercial domain. On the other hand, there is another line of cases, originating with the Ninth Circuit Court of Appeals, in which a balancing approach is used in deciding whether to estop the Government. Under this balancing paradigm, the harm to the Government by allowing estoppel is weighed against the harm to the individual in denying estoppel. Accordingly, the crux of this approach is balancing competing interests.

While these two methods have differing labels, they are not fundamentally distinct. Indeed, contractors seeking to estop the Government can probably expect to reach the same final result under either theory. Academicians and practitioners, however, need to be cognizant of both of the approaches mentioned above and their impact in estoppel cases since courts continue to rely on both of them. Accordingly, in this chapter I have endeavored to analyze the nature of these two approaches thereby delineating the circumstances under which the Government can be equitably estopped from asserting a claim or defense against a contractor.

B. The Sovereign/Proprietary Approach

In an effort to ensure that citizens are fairly treated by the Government, many courts and boards allow the Government to be estopped from asserting a claim or defense when it acts in its "proprietary" capacity.[3] Proprietary capacity is to be distinguished from sovereign capacity for the Government cannot be estopped when it acts in the latter capacity under this approach.[4] Proponents of the sovereign/proprietary classification arguably have some precedent to support their view that government conduct can be categorized. Specifically, in Cooke v. United States[5] the Supreme Court stated: "A government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there."[6]

Further justification for estopping the Government in its proprietary capacity stems from the decline in the doctrine of sovereign immunity. An early pronouncement on the doctrine of sovereign immunity occurred in U.S. v. Shaw[7] where the Supreme Court stated:

> The reasons for this immunity are imbedded in our legal philosophy. They partake somewhat of dignity and decorum, somewhat of practical administration, somewhat of the political desirability of an impregnable legal citadel where government as distinct from its functionaries may operate undisturbed by the demands of litigants.[8]

Fortunately, fewer courts rely on the doctrine of sovereign immunity today. In fact, sovereign immunity is nearly an anachronism in today's society and is best left for study by legal historians. Congress has waived much of traditional governmental immunity through legislation.[9] In federal procurement the erosion of sovereign immunity is particularly dramatic.[10] The courts have also significantly weakened the doctrine of sovereign immunity[11] and numerous commentators have criticized it.[12] Besides, its use is economically unsound when tested against general insurance cost sharing principles. One writer has noted:

> In days gone by, society often allowed the burden of misfortune to remain solely on the shoulders where the burden chanced to fall. The welfare state, however, reflects a different conception, namely, that when a burden is shared by everybody, it does not become disastrously heavy for anybody. Limited recognition of public liability for personal loss caused by governmental activity runs counter to that modern social notion.[13]

In the seminal case of United States v. Georgia-Pacific Co.,[14] the Ninth Circuit Court of Appeals relied on the decline in the doctrine of sovereign immunity to utilize and popularize the sovereign/proprietary distinction. In this case the United States Forest Service contracted in 1934 to extend the boundaries of the Siskiyou National Forest to cover a portion of Georgia-Pacific's land. Georgia-Pacific received fire protection for their forest from the Government and in return was expected to transfer title to the Government after the lumber had been harvested. However, the Forest Service retracted the boundaries of the National Forest thereby depriving Georgia-Pacific the benefit of its bargain. For several years the Government made no claim against Georgia-Pacific to convey land pursuant to their original agreement. While the Government failed to assert any rights under the contract, Georgia-Pacific maintained at its own expense the portion of the forest previously protected by the

Government.

The court upheld Georgia-Pacific's equitable estoppel defense to the Government's claim that it was entitled to the land it had not protected or asserted any rights against. In its analysis, the court drew a distinction between the Government acting in its sovereign capacity and its proprietary capacity. Under this approach, the Government can be estopped if it acts in its proprietary capacity. As to the issue of proprietary capacity, the court noted:

> [T]he Government is suing to enforce a contract between it and a third party, and is thus acting as a private party would. The question here is not that of preserving public lands-since the Government never had title to the cutover lands it is now claiming-but only of enforcing a private contract to gain new title to lands.[13]

In sum, the court in Georgia-Pacific devised a test which permits the Government to be equitably estopped in some cases. A fair reading of the case suggests that estoppel against the United States is appropriate when the Government employee's conduct which forms the basis for the estoppel arises out of or is related to one's contract with the Government because in such cases the Government would be acting in its proprietary or commercial capacity. In its proprietary capacity, the United States is expected to deal fairly with its citizens. If it does not, estoppel is an appropriate remedy since the public interest is not likely to be significantly harmed when the Government performs commercial type functions.

Many courts and boards have adopted the sovereign/proprietary distinction as outlined in Georgia-Pacific and continue to utilize it.[16] For example, the Eleventh Circuit Court of Appeals recently discussed the approach at length in Federal Deposit Insurance Corp. v. Harrison.[17] In Harrison, two individuals sought to estop the Federal Deposit Insurance Corporation(FDIC), a Government owned corporation, from collecting amounts due under a guaranty agreement they had signed with a bankrupt bank. The court reasoned that as a liquidating agent for the failed bank, the FDIC performed essentially the same function as any other private bank and therefore should be held accountable for its employees representations and actions. The court noted:

> [A]s would any other receiver or liquidating agent, FDIC should be required to deal fairly with its debtors and should be held accountable for the representations of its agents. Had Bell's promissory note been acquired by a financially sound bank in a "purchase and assumption" transaction, the assuming bank would be subject to the doctrine of equitable estoppel. The Corporation should be treated no differently.[18]

C. Classifications

1. Sovereign Capacity

Given the sovereign/proprietary distinction, it is axiomatic that government conduct must be categorized.

While it is often not an easy task to classify certain governmental conduct, many courts and boards have attempted to articulate some reasonably clear definition as to when the Government acts in its sovereign capacity.

A classic explanation of sovereign capacity is found in Georgia-Pacific where, with seeming assuredness, the court offered: "[I]n its sovereign role, the Government is carrying out its unique governmental functions for the benefit of the whole public."[19] Examples of sovereign capacity include the Government administering educational loan programs,[20] collecting import duties,[21] granting land for public park use,[22] prosecuting criminals,[23] and interpreting tax statutes,[24].

In Somerville Technical Services v. United States,[25] the Court of Claims held that the Government could not be estopped when it acts in a sovereign capacity. In this case the Court of Claims found that the Farmers Home Administration(FHA) was acting in a sovereign capacity when it made a community facility loan and grant to a village for construction of a sewer plant and in requiring the project to be constructed in accordance with the wishes of Congress. Since the FHA acted in a sovereign capacity, the Government was found not to be liable for the contractor's cost overruns on the project. Numerous other examples are cited by the court in Federal Deposit Insurance Corp. v. Harrison.[26]

Curiously, one court has found that the Government acts in its sovereign capacity when it purchases certain supplies under a contract.[27] Yet, it hardly seems rational to say that procuring a weapon system is a unique governmental activity but purchasing a multi-billion dollar space transportation system is not. The issue of whether to estop the Government should not turn on the nature of the supplies puchased under a contract. It appears to this writer that the Government acts in its contractual or proprietary capacity in any contract it enters into because contracting is hardly a unique governmental activity. On the other hand, providing social security benefits and implementing immigration policy are two unique governmental activities in which the Government arguably does act in its sovereign capacity.

The former Fifth Circuit Court of Appeals seems to have a better understanding for the concept of sovereign capacity and its application in estoppel cases. The court presented their view in United States v. Florida[28]:

> Whether the defense of estoppel may be asserted against the United States in actions instituted by it depends upon whether such actions arise out of transactions entered into in its proprietary capacity or contract relationships, or whether the actions arise out of the exercise of its powers of government. The United States is not subject to an estoppel which impedes the exercise of the powers of government....[29]

The portion of the above statement which says "[t]he United States is not subject to an estoppel which impedes the exercise of the powers of government..."[30] is particularly noteworthy because it suggests that the Government cannot be estopped or prevented from carrying out its sovereign duties. An example of this principle occurred in Pacific Shrimp Co. v. United States,[31] where the owner of a diesel powered vessel brought an action for declaratory and injunctive relief against the United States Department of Transportation. The owner sought to estop the Government from enforcing inspection laws which it had not enforced for over 30 years. In rejecting the owner's estoppel argument the court replied: "An administrative agency charged with protecting the public interest, is not precluded from taking appropriate action ...."[32]

Numerous other courts and boards have also refused to estop the Government from asserting the sovereign acts defense. The sovereign acts defense has been described by the Supreme Court as follows:

> It has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign...In the Jones Case...the court said: "The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct, or violate the particular contracts into which it enters with private persons..."In this court the United States appear simply as contractors; and they are to be

> held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants.[33]

Clearly, it would impede the Government's powers to estop it from asserting the sovereign acts defense. One recent decision where a contractor tried to estop the Government from asserting the sovereign acts defense is Warner Electric,Inc..[34]

In this case a contractor agreed to replace 97 transformers and 28 switches for a Veteran's Administration Hospital. The contractor had intended to export the transformers for salvage value and priced its bid accordingly. Unfortunately, neither the Government nor the contractor knew at the time of formation that the transformers contained polychlorinated biphenyls(PCB's). Moreover, a few months before bid opening, the Environmental Protection Agency(EPA) had issued regulations banning the export of items which contained PCB's. Of course, upon discovering the PCB's, the contractor realized it could not export the transformers and recoup their salvage value.

The contractor initially requested a change order for the additional expense he was going to incur. The contracting officer denied this claim but later agreed to reconsider the claim under a differing site condition theory. Finally, the contracting officer denied the differing site claim based on the sovereign acts defense.

The contractor argued that the Government should be estopped to deny [that] the total effect of its directions amounted to a constructive change order. The board, however, found otherwise:

> It is well established that the United States when sued as a contracting party cannot be held liable for an obstruction to the performance of a particular contract resulting from its public and general acts as a sovereign. Horowitz v. United States, 267 U.S. 458,461(1925). The only change which occurred which affected this particular contract was outside the scope of the contract, i.e., the enactment of Federal regulations. These regulations were issued as the exercise of the sovereign power of the United States and clearly were not an action taken by the Government in its capacity as a party under the contract....[35]

The Federal Circuit Court of Appeals was also not persuaded by the contractor's estoppel argument. The court upheld the board's granting of the Government's motion for summary judgment based on the sovereign acts doctrine. In an unpublished decision, the court said:

> It is Warner's contention that, although the act was sovereign, it was a compensable sovereign act. Further, as a compensable sovereign act, Warner is entitled to recover under principles of equitable estoppel and apparent authority. We believe this to be a contradiction of terms. The act is either sovereign and recovery is precluded or the act was contractual and was not excused by the sovereign act doctrine.[36]

2. Proprietary Capacity

Several courts and boards have also attempted to provide guidance on when the Government acts in a proprietary capacity. One court opined:

> In ordinary contractual relations with its citizens, the government enjoys the same privileges and assumes the same liabilities as does its citizens. This is distinguished from the situation where the sovereign is seeking to enforce a public right or protect a public interest, for example, eminent domain or an exercise of the taxing power...[w]hen the government enters the market place, however, and puts itself in the position of one of its citizens seeking to enforce a contractual right(i.e., one arising from express consent rather than sovereignty), it submits to the same rules which govern legal relations among its subjects.[37]

In Federal Deposit Insurance Corp. v. Harrison,[38] the Eleventh Circuit Court of Appeals offered the following guidance: "Activities undertaken by the government primarily for the commercial benefit of the government or an individual agency are subject to estoppel."[39] Agencies that purchase or sell goods and services for their own commercial benefit are also performing proprietary governmental functions.[40] Numerous other examples of the Government acting in its proprietary capacity exist.[41]

With regards to government contracts, the court in Portmann v. United States[42] made the following observation: "The sovereign/proprietary distinction has proven to be particularly useful in cases involving government contracts."[43] What the court means is that government conduct will more readily be characterized as proprietary when a dispute stems from a contract relationship with the Government.

In fact, most courts and boards have generally agreed that the Government acts in its proprietary capacity in its contract relations.[44] This has allowed government contractors to successfully use equitable estoppel against the Government. Often, courts and boards will find proprietary governmental conduct without offering any rationale simply because a contract exists. For example, in Western Electric Co.,[45] the board stated: "In this appeal there is no disagreement that Respondent in contracting with Bellcom was acting in its proprietary capacity...."[46] The board in Chrysler Corp.[47] stated: "It is well settled than an equitable estoppel may be found against the Government if, first, the Government is acting in its proprietary rather than its sovereign capacity...."[48] In Georgia-Pacific, the court felt the Government had acted as a private party would in suing to enforce a contract with a third party. Thus, the court estopped the Government based on its proprietary conduct.

In Branch Banking & Trust Co. v. United States,[49] the Government entered into two cost plus fixed fee contracts in which the contractor was obligated to construct an anti-aircraft firing center. Without much discussion, the Court of Claims found proprietary governmental conduct and estopped the Government from withholding excess profits under the contract. In fact, because it is so clear that the Government acts in its proprietary capacity when it engages in contract relations, courts and boards utilizing the sovereign/proprietary approach today often find it unnecessary to reconfirm this fact in their decisions. Instead, their focus is directed to whether the four traditional elements of estoppel have been satisfied and whether government agents acted within the scope of their authority. However, many decisions still reconfirm the proprietary nature of government contracting. For example, the board in Village Properties[50] stated: "Equitable estoppel is applicable to the Government in its commercial role as a procurer of goods and services under contracts...."[51]

Despite the general view that the Government acts in its proprietary capacity when engaged in contract relations, there is some authority suggesting otherwise. Specifically, in United States v. Medico Industries, Inc.,[52] the court declared, with no underlying rationale that the Government did not act in a proprietary capacity when it bought munitions. The court did not define the kind of goods covered by their ruling yet munitions are commonly defined as materials used in war, especially weapons and ammunition.[53]

In Medico, the contractor Medico had entered into an initial contract with the United States Army to produce M49A3 60mm projectiles. Medico subsequently agreed to a modification to produce more projectiles. The Government later brought a declaratory judgment against Medico alleging that a former Government employee violated the conflict of interest prohibition contained in 18 U.S.C. Section 207. Medico defended based on equitable estoppel arguing that the Army knew of the potential conflicts and acquiesced in them.

The court upheld the lower court's determination that equitable estoppel was not availing as a defense. However, in arriving at this conclusion the court stated in a footnote at the end of the opinion: "[T]he rule in our circuit allowing agents engaged in proprietary activities to estop the government...does not affect this case. The acquisition of munitions is not proprietary...."[34]

One potential implication from this holding is that the Government cannot be equitably estopped when it procures weapons and arms(i.e. Department of Defense contracts). However, such an absurd result only confirms the faulty reasoning and conclusion reached by the court. Accepting the court's view would make it particulary difficult for defense contractors to succeed with equitable estoppel arguments in the Seventh Circuit since many defense contracts involve munitions. Clearly, such an incongruous result was not the court's intent. Accepting the opinion at face value would make the availability of equitable estoppel turn on the nature of the supplies and services in a contract. Moreover, determining the Government's capacity based on the nature of supplies in a contract would not be an easy task since the court offered no basis for treating munitions differently from any other supplies. Again, the more sensible rule is that the Government acts in its proprietary capacity in all of its contracts.

D. Balancing Approach

Several courts have also employed an alternative approach to decide whether the Government should be estopped from asserting a claim or defense in litigation in view of its sovereign status.[55] This approach has commonly been referred to as a balancing test.

Supreme Court precedent supporting this balancing approach exists in _Federal Crop Insurance Corp. v. Merrill_.[56] In _Merrill_, an agent of the Federal Crop Insurance Corporation(FCIC), a government corporation created by the Department of Agriculture, erroneously advised Merrill that the spring wheat that Merrill intended to plant on winter wheat acreage was fully covered against loss under the Federal Crop Insurance Act. Subsequently, the FCIC and Merrill executed an insurance contract and an insurance policy was issued. In fact, the FCIC's own published regulations stated that spring wheat planted on reseeded winter wheat acreage was uninsurable. Merrill planted the spring wheat on his winter acreage but after a drought the crop was ruined. Relying on its published regulations which forbade payment, the FCIC refused to compensate Merrill for his loss.

The state supreme court upheld Merrill's claim, finding that the FCIC had acted as a private insurer would act and that a private company would be bound under similiar circumstances. The state court adopted the sovereign/proprietary distinction in effect by stating it was "not dealing directly with the government as such...but dealing with a corporation created as an agency of the Department of Agriculture and with one of its regulatons adopting a policy with respect to the conduct of its proprietary insurance business."[37]

Although Merrill successfully litigated his claim in the lower court, the Supreme Court disallowed his claim on appeal. In rejecting Merrill's claim, the Supreme Court did not expressly discuss the principle of equitable estoppel although the claim was undeniably one of estoppel.

More importantly, the Supreme Court discounted an estoppel analysis predicated on whether the Government acted in a proprietary capacity. The Court said:

> It is too late in the day to urge that the Government is just another private

> litigant...whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures. Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it.[58]

However, it should be noted that many courts and commentators have considered the Supreme Court's apparent dislike of a sovereign/proprietary distinction as expressed in Merrill to be mere dicta especially in light of its earlier decision in Cooke which arguably supports the use of a sovereign/proprietary distinction in estoppel claims against the government.[59] Moreover, the Supreme Court has not in recent times been forced to rule on an estoppel argument against the Government when the Government has acted in a proprietary capacity(e.g. contract case). Instead, the Court has rejected estoppel arguments against the Government in cases where the Government was performing unique governmental activities and thus acting in its sovereign capacity.[60] Thus, it is quite possible that the Supreme Court might find some merit in the sovereign/proprietary distinction if presented with the proper case at some future point in time.

Under the balancing approach, a court balances on a case by case basis the seriousness of the injury to the individual if estoppel is not granted against the public policy interests that would be affected if estoppel was invoked against the Government. The balancing approach was initially fashioned by the Ninth Circuit Court of Appeals in United States v. Lazy FC Ranch.[51] In Lazy FC Ranch, private individuals formed a partnership to acquire and operate agricultural and pasture land in Cassia County, Idaho. After receiving assurances from a Government official as to the legality of the proposed arrangement, the individual partners entered into various government contracts with the Agricultural Stabilization and Conservation Service of the Department of Agriculture. The partners sought to qualify their lands under the Acreage Reserve and Conservation Reserve programs of the Soil Bank Act, 7 U.S.C. Section 1801, et seq.. At a later point the Government sought to recover monies paid to the partners contrary to agency regulations. The partners urged that estoppel be applied against the Government and both the lower and appellate courts agreed though on different reasoning. The court estopped the Government and said that the Government can be estopped when justice and fair play require it. More recently, in Jaa v. INS,[52] the Ninth Circuit Court of Appeals reaffirmed its desire to follow the balancing test it had layed out in Lazy FC Ranch.

Despite different terminology, the sovereign/proprietary approach and the balancing test are not fundamentally different and contractors seeking to estop the Government can probably expect identical results under either approach. In fact, despite the language in Merrill casting doubt on the efficacy of a sovereign/proprietary distinction, courts using the balancing approach still continue to consider whether the Government acted in a sovereign or proprietary capacity. One recent decision analyzed the balancing test as follows:

> [T]he Court must balance the equities favoring the party asserting the estoppel against the impairment of public policy that would result if the estoppel were allowed. A number of factors are relevant to this balancing. One important consideration is whether the government is acting in a sovereign or proprietary capacity....[63]

Moreover, their determination on whether the Government acted in a sovereign or proprietary capacity appears to be an important factor in the balancing calculus. One recent decision illustrating this point is Portmann v. United States.[64] In Portmann, the primary issue was whether the doctrine of equitable estoppel could be invoked against the United States Postal Service on the basis of representations made by a postal employee to an "Express Mail" customer who sought to recover on an insurance contract with the Postal Service. In its analysis, the Seventh Circuit Court of Appeals utilized a balzncing test but stated that the proprietary character of the Government's conduct militated in favor of allowing the Government to be estopped although the final decision had to be made by the lower court on remand. Thus, under the balancing test, the sovereign or proprietary nature of the

Government's conduct is still an important factor in the decision-making process.

In articulating their new test in Lazy FC Ranch, the Ninth Circuit Court of Appeals said:

> The Moser-Brandt-Schuster line of cases establish the proposition that estoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel...[t]his proposition is true even if the government is acting in a capacity that has traditionally been described as sovereign(as distinguished from proprietary) although we may be more reluctant to estop the government when it is acting in this capacity.[65]

One important implication from the above statement is that it is easier under the balancing test to estop the Government from asserting a claim or defense when it acts in its proprietary capacity. Indeed, the balancing test stands for the proposition that the Government might be estopped from asserting a claim or defense even in its sovereign capacity.[66]

In sum, it appears that the Ninth Circuit Court of Appeals has expanded the doctrine of estoppel to include not just government contracting but other non-proprietary governmental activities as well. In fact, the balancing test has been used to estop the Government from asserting a claim or defense in a tax case,[67] an immigration case,[68] and in a case involving a claim of title to public lands.[69] However, it seems clear that the rule that the Government can be readily estopped from asserting a claim or defense in its proprietary capacity has not been changed under the balancing test. In fact, estoppel of the Government has not been narrowed but only potentially expanded. In effect, the sovereign/proprietary distinction has been subsumed into a balancing test where it continues to play a major role. Indeed, Ninth Circuit Court of Appeals decisions subsequent to Lazy FC Ranch make this clear. In particular, Judge Choy in Santiago v. INS stated:

> [W]e have not hesistated to apply estoppel to the Government when it acts in its proprietary, rather than its sovereign, capacity...[w]e have not rested our decisions on whether we categorized acts as proprietary or sovereign, however; we have simply recognized that protection of the public welfare and deference to congressional desires is much more apt to outweigh hardships to private individuals in the equitable balance when estoppel is asserted against sovereign acts....[79]

The public interest will rarely be unduly damaged by estopping the Government from asserting a claim or defense in government contract cases because the Government acts in a commercial role in such cases. Even if estopped from asserting a claim or defense in such cases, the Government can always get the supplies or services it needs by paying for them. On the other hand, contractors can be severely harmed if the Government is not required to deal fairly with them. Detrimental reliance by contractors on government employee misrepresentations, without relief, could cause contractors to suffer significant economic harm. This would in turn not serve the best interests of the Government since fewer contractors might pursue government contracts given such inherent risks. Also, the Government might end up paying more for the supplies and services it purchases to compensate contractors for this risk.

On the other hand, estopping the Government from asserting a claim or defense when it acts in its sovereign capacity arguably could damage the public interest much more severely. Often, important public policies besides just protecting the public fisc are at stake. This realization seems apparent in several Supreme Court cases where the Court refused to estop the Government when the Government was clearly acting in its sovereign capacity.[71]

In sum, despite differing labels, both the sovereign/proprietary approach and the balancing test allow government contractors to estop the Government from asserting certain claims and defenses. Accordingly, government contractors will continue to occupy an enviable position in terms of their ability to estop the United States.

Chapter Two Footnotes

1. See 28 Am.Jur.2d Estoppel & Waiver 35(1966).

2. See e.g., United States v. Georgia-Pac.Co., 421 F.2d 92(9th Cir.1970)(Government estopped from asserting claim to land); Dana Co. v. United States, 470 F.2d 1032(Ct.Cl.1972)(Government estopped from denying actions of its employee); See also USA Petroleum Co. v. United States, 821 F.2d 622(Fed Cir.1987)(Government estopped from recouping funds in restitution).

3. See Branch Banking & Trust Co., 98 F.Supp. 757,766(Ct.Cl.1951); Lockheed Shipbuilding & Constr.Co.,ASBCA No. 18460, 75-1 BCA 11246, mot. for reconsid. denied, 75-2 BCA 11566.

4. See Somerville Technical Servs. v. United States, 640 F.2d 1276,1282(Ct.Cl.1981); New Mexico v. Aamodt, 537 F.2d 1102,1110(10th Cir.1976), cert.denied, 429 U.S. 1121(1977); Air-Sea Brokers,Inc. v. United States, 596 F.2d 1008,1011(C.C.P.A..1979); ATC Petroleum,Inc. v. Sanders, 661 F.Supp 182,187(D.D.C.1987); George v. Railroad Retirement Bd., 738 F.2d 1233,1236(11th Cir.1984). See also Note, Equitable Estoppel of the Federal Government: An Application of the Proprietary Function Exception to the Traditional Rule, 55 Fordham L.Rev. 707(1987).

5. Cooke v. United States, 91 U.S. 389(1875).

6. Id. at 398.

7. United States v. Shaw, 309 U.S. 495(1940).

8. Id. at 501.

9. See e.g., Federal Tort Claims Act, 28 U.S.C.A. 1346(b)(1982); Mandamus & Venue Act, 28 U.S.C.A. 1361(1962); Title VII of Civil Rights Act of 1964, 42 U.S.C.A. 2000e et seq..

10. See e.g., Tucker Act, 28 U.S.C.A. 1346(a),1491(1982); Contract Disputes Act, 41 U.S.C.A. 601 et seq.(1978); Federal Courts Improvement Act, P.L. 97-164(1982)(codified as amended at 28 U.S.C.A. 1491(1982).

11. See e.g. United States v. Georgia-Pacific Co., 421 F.2d 92(9th Cir.1970); Keifer v. Reconstr.Finance Co., 306 U.S. 381(1939). State courts have also expressed their dislike for the doctrine of sovereign immunity. See e.g., Stone v. Ariz. Highway Comm'n., 93 Ariz. 384, 381 P.2d 107(1963); Evans v. Board of County Comm'rs., 174 Colo. 97, 482 P.2d 968(1971).

12. See e.g., Charles H. Koch Jr., Administrative Law & Practice, Sections 10.51-55, Vol. 2(1985); Schweiker v. Hansen:Equitable Estoppel Against the Government, 67 Cornell L.Rev. 608(1982).

13. W.Gellhorn,C.Byse & P.Strauss, Administrative Law 1110(7th ed.1979).

14. United States v. Georgia-Pacific Co., 421 F.2d 92(9th Cir.1970).

15. Id. at 101.

16. See e.g., United States v. Fla., 482 F.2d 205(5th Cir.1973); Chrysler Co., NASABCA No. 1075-10, 77-1 BCA 12482(1977); Village Properties, HUDBCA No. 85-962-C6, 87-2 BCA 19704; United States v. Federal Ins.Co., 805 F.2d 1012(Fed Cir.1986), cert.denied, 107 S.Ct. 2179(1987); ATC Petroleum Inc. v. Sanders, 661 F.Supp 182(D.D.C.1987). See also Comp.Gen.Dec. B-219273, December 26, 1985,unpub.(Government must act in its proprietary capacity for estoppel to be applied against it).

17. Federal Deposit Ins.Co. v. Harrison, 735 F.2d 408(11th Cir.1984).

18. Id. at 412.

19. United States v. Georgia-Pac.Co., 421 F.2d at 101.

20. Hicks v. Califano, 450 F.Supp 278(N.D.Ga.1977), aff'd sub.nom. Hicks v. Harris, 606 F.2d 65(5th Cir. 1979).

21. Air-Sea Brokers,Inc. v. United States, 596 F.2d 1008(C.C.P.A.1977).

22. United States v. Fla., 486 F.2d 205(5th Cir.1973).

23. United States v. Mattucci, 502 F.2d 883(6th Cir.1974).

24. Automobile Club v. Commissioner, 353 U.S. 180(1957).

25. Somerville Technical Servs. v. United States, 640 F.2d 1276(Ct.Cl.1981).

26. Federal Deposit Ins.Corp. v. Harrison, 735 F.2d at 411.

27. United States v. Medico Indus.,Inc., 784 F.2d 840(7th Cir.1986).

28. United States v. Fla., 482 F.2d 205(5th Cir.1973).

29. Id. at 209.

30. Id. at 209.

31. Pacific Shrimp Co. v. United States, 735 F.Supp 1036(1974).

32. Id. at 1042.

33. Horowitz v. United States, 267 U.S. 458,461(1925).

34. Warner Elec.,Inc., VABCA No. 2106, 85-2 BCA 18131, aff'd 5 FPD 19(Fed.Cir.1986)(unpub.).

35. Id. at 90997,90998.

36. Warner Elec.,Inc., 5 FPD 19 at 3(unpub.).

37. McQuagge v. United States, 197 F.Supp 460,469(W.D.La.1961). Yet, this same court qualified itself by stating: "The defense of estoppel may be(though sparingly) availed of against the United States in transactions involving its proprietary functions, providing the functions of the government are not impaired thereby." Id. at 471.

38. Federal Deposit Ins.Corp. v. Harrison, 735 F.2d 408(11th Cir.1984).

39. Id. at 411.

40. Id. at 411.

41. See e.g., Roberts v. United States, 357 F.2d 938(Ct.Cl.1966)(contracting for construction of road); United States v. Mailet, 294 F.Supp. 761(D.Mass.1968)(selling government property); Emeco Indus.,Inc. v. United States, 485 F.2d 652(Ct.Cl.1973)(contracting for office supplies). Other examples are illustrated in Federal Deposit Ins.Corp. v. Harrison, 735 F.2d at 411.

42. Portmann v. United States, 674 F.2d 1155(7th Cir.1982).

43. Id. at 1160.

44. See e.g., Codex Co., ASBCA No. 17983, 75-2 BCA 11554; United States v. Georgia-Pacific Co., 421 F.2d 92(9th Cir.1970).

45. Western Elec. Co., NSABCA No. 777-5, 79-2 BCA 14156.

46. Id. at 69704.

47. Chrysler Corp., NSABCA No. 1075-10, 77-1 BCA 12482.

48. Id. at 60509.

49. Branch Banking & Trust Co. v. United States, 98 F.Supp. 757(Ct.Cl.1951).

50. Village Properties, HUDBCA No. 85-962-C6, 87-2 BCA 19704.

51. Id. at 99768(emphasis added).

52. United States v. Medico Indus.,Inc., 784 F.2d 840(7th Cir.1986).

53. Random House Dictionary of the English Language(1969).

54. United States v. Medico Indus.,Inc., 784 F.2d at 846.

55. See e.g., United States v. Lazy FC Ranch, 481 F.2d 985(9th Cir.1973); Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411(10th Cir.1984); Portmann v. United States, 674 F.2d 1155(7th Cir.1982).

56. Federal Crop Ins.Corp. v. Merrill, 332 U.S. 380(1947).

57. Federal Crop Ins.Corp. v. Merrill, 67 Idaho 196, 174 P.2d 834(1946), rev'd 332 U.S. 380(1947).

58. Federal Crop Ins.Corp. v. Merrill, 332 U.S. at 383,384(emphasis added).

59. See Note, supra note 4, at 20.

60. See e.g., Mont. v. Kennedy, 366 U.S. 308(1961)(citizenship case); INS v. Hibi, 414 U.S. 5(1973)(per curiam)(citizenship case); Schweiker v. Hansen, 450 U.S. 785(1981)(per curiam)(Social Security benefits sought by applicant); Heckler v. Community Health Servs. of Crawford County, 467 U.S. 51(1984)(improperly paid Medicare benefits).

61. United States v. Lazy FC Ranch, 481 F.2d 985(9th Cir.1973).

62. Jaa v. INS, 799 F.2d 569,572(9th Cir.1986).

63. Pierce v. Apple Valley,Inc., 597 F.Supp 1480(S.D.Ohio 1984)(emphasis added).

64. Portmann v. United States, 674 F.2d 1155(7th Cir.1982). See also Meister Bros. v. Macy, 674 F.2d 1174(7th Cir.1982)(estoppel may lie against Government when agency is not in any sense acting in sovereign capacity but was engaged in essentially a private business).

65. United States v. Lazy FC Ranch, 481 F.2d at 989.

66. United States v. Ruby, 588 F.2d 697,703(9th

Cir.1978)(estoppel may be applied against Government even when acting in its sovereign capacity).

67. Schuster v. Commissioner, 312 F.2d 311(9th Cir.1962).

68. Sun II Yoo v. INS, 534 F.2d 1325(9th Cir.1976).

69. United States v. Wharton, 514 F.2d 406(9th Cir.1975).

70. Santiago v. INS, 526 F.2d 488,496 (9th Cir.1975)(Choy,dissenting)(emphasis added).

71. See e.g., Miranda v. INS, 459 U.S. 14(1982)(per curiam)(immigration and naturalization policies enforced).

III. Authority Needed to Estop the Federal Government

In this chapter I have not attempted to cover all the cases or draw all the fine lines on the issue of authority needed to estop the Federal Government. Instead, my discussion and analysis of the current law provides a basis for arriving at some central conclusions on the nature of authority necessary for contractors to estop the Government from asserting a claim or defense in a litigative setting.

Several conclusions are apparent from my analysis. First, it appears that the courts and boards will not as a rule estop the United States when its agents have acted without actual authority or when the effect of an estoppel would be to bind the Government "to do or cause to be done what the law does not sanction or permit."[1] Additionally, the concept of apparent authority will generally not be applied against the United States because contractors are expected to know the limits of an agent's authority as expressed in relevant statutes and properly promulgated regulations.

It must also be recognized, however, that "affirmative misconduct" on the part of government employees might allow the Government to be equitably estopped from asserting a claim or defense even when its employees have acted without actual authority or the effect of the estoppel would result in the violation of a statute or regulation. However, such a likelihood is doubtful at this time given the Supreme

Court's consistent failure to find affirmative misconduct in any estoppel case that has come before them. Moreover, most lower courts have been equally reluctant to find affirmative misconduct given Supreme Court precedent. Nonetheless, the role of affirmative misconduct in estopping the government cannot be overlooked because the Supreme Court and most lower courts continue to utilize it in contractual and non-contractual contexts when persons seek to estop the Government.

A. Actual Authority Required

It has generally been held that the unauthorized acts of government employees cannot support an estoppel against the Government.[2] A recent Veteran's Administration Board of Contract Apppeals decision illustrates this principle. Specifically, in BudRho Energy Systems,[3] the Government issued a fixed price architectural/engineering(A/E) service contract to a contractor(BudRho) for construction and other services. Under the contract, a contracting officer's representaive holding the title of "project coordinator" had the authority to request certain site visits and to request construction cost proposal reviews. However, the project coordinator had no authority to order such services once funding allocated to such functions had been exhausted. At that point, the contracting officer(CO) was required to issue a change order pursuant to the contract's changes clause. Despite this limit on the project coordinator's authority, BudRho performed numerous services at the direction of the project coordinator for which funds had not been allocated. Nevertheless, BudRho sought recovery for costs it incurred in following the Project Coordinator's directions.

In addressing BudRho's argument that the Government should be estopped from disclaiming the Project Coordinator's representations and directions, the board stated:

> It has long been a tenet of Federal contract law that an employee without actual authority cannot bind the Government...[h]ere the Appellant chose to rely strictly upon Mr. Anaston's[Project Coordinator] assurances that a change order would be forthcoming, notwithstanding the clear contract admonition that <u>only</u> the CO could authorize such a change...[t]his contractor thus failed to exercise reasonable diligence to protect its own interests and cannot therefore be compensated....[4]

On the other hand, there is an abundance of authority which permits the Government to be equitably estopped from asserting a claim or defense when its employees act with actual authority in their dealings with contractors.[5] For example, in <u>Manloading & Management Associates,Inc. v. United States</u>,[6] the Court of Claims estopped the Government from denying one of its employee's representations at a pre-award bidders conference. After determining that the government agent was fully authorized to provide the information he gave to the prospective bidders, the court quoted one of its earlier opinions and said:

> To hold that the writing signed following such a conference as here took place negates the oral

> agreement reached at the conference would be reckless of the reputation of the procurement system in which bidders' conferences are an integral part. Meetings between Government procurement officers and prosepective bidders would become a sham. Questions would be useless, for answers would be without force, and the amounts of the bids received would soon show the results. Respect for the answer is required by the respect given the Government's procurement process.[7]

1. Precedent for Actual Authority Requirement

The requirement that government employees act within the scope of their authority before the Government can be estopped is the product of a long line of Supreme Court cases. Three of the most significant cases are discussed below.

One of the earliest cases to impose this special element in estoppel arguments against the Government was _Lee v. Munroe_.[8] In _Lee_, two individuals (Morris and Nicholson) were indebted to Lee for the sum of $3000.00. To satisfy their obligations to Lee, Morris and Nicholson offered to convey land upon which they had made partial payments. The parties all apparently believed that the Washington DC Commissioners would transfer title of the land to Lee upon the direction of Morris and Nicholson. In fact, Lee received assurances from the Commissioners in this regard. However, after Lee had relieved Morris and Nicholson from their personal obligations to him, the Commissioners refused to surrender the land to Lee in spite of a direction to convey from Morris and Nicholson because the property had not been fully paid for by Morris and Nicholson. Lee subsequently brought suit against city officials seeking a $3000.00 credit on the land he was seeking to purchase.

Lee sought to estop the city officials from asserting that the land had not been paid for since they had earlier promised to convey the land to him. The Supreme Court found the Commissioners' promise to be gratuitous and not within the sphere of their official duties. Accordingly, the Court refused to estop the officials from raising the defense of non-payment.

Thus, it appears that early concerns of the Court justifying the actual authority requirement were the desire to protect public land and the need to prevent improper collusive activity between government employees and those dealing with the Government. The Court in Lee expressed their sentiment as follows:

> [W]ere it otherwise, an officer entrusted with the sales of public lands, or empowered to make contracts for such sales, might, by inadvertance, or incautiously giving information to others, destroy the lien of his principals on very valuable and large tracts of real estate, and even produce alienations of them, without any consideration whatever being received, It is better that an individual should now and then suffer by such mistakes, than to introduce a rule against an abuse, of which, by improper collusions, it would be very difficult for the public to protect itself.[9]

The next major case to address the scope of authority limitation on estopping the Government was Utah Power &

Light Company v. United States.[10] This case also stemmed from a controversy involving public lands. Specifically, power companies, on largely public land, were using diversion dams, reservoirs, pipe lines, power houses, transmission lines, and subsidiary structures to generate and distribute electrical power. The United States brought suit to enjoin the companies continued occupancy and use, without its permission, of portions of this public land. The defendant companies claimed that they proceeded with construction based on government employee representations. The defendants claimed that they had an entered into an agreement with the Government which authorized their activities. After determining that the government employees acted without authority under federal law, the Court succinctly responded:

> Of this it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.[11]

The case most often cited for the actual authority rule is *Federal Crop Insurance Corp. v. Merrill*.[12] It is fair to say that this opinion is one of the most important decisions in the law of estopping the Government. Even today the decision continues to play a crucial role in the development of the law. In fact, the Supreme Court and lower courts continue to cite this case with approval in their decisions.[13] As discussed in chapter two, *Merrill* involved a farmer who procured crop insurance from the

Federal Crop Insurance Corporation(FCIC). The insurance was purchased after the Merrills received assurances from representatives of the FCIC that the crop was insurable. As it turned out, the crop was uninsurable pursuant to a duly promulgated regulation of the FCIC.

The Court concluded that a government employee's actual authority was dictated by congressionally passed statutes and administrative regulations implementing such statutes having the force and effect of law. Moreover, in the process of limiting the use of estoppel against the Government, the Court placed an affirmative burden on persons contracting with the Government. The Court expressed this burden as follows:

> Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority.[14]

2. Rationale for the Actual Authority Rule

Varied reasons have been articulated to justify the actual authority rule. The most frequently asserted reasons for the rule are protecting the public fisc and ensuring the continued vitality of the constitutional principle of separation of powers.

The Supreme Court and lower courts have articulated the rationale of protecting the public fisc on several occasions.[15] Quoting Justice Holmes' statement that "men must turn square corners when they deal with the government", the Supreme Court recently stated:

> This observation has its greatest force when a private party seeks to spend the Government's money. Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law; respondent could expect no less than to be held to the most demanding standards in its quest for public funds. This is consistent with the general rule that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law.[16]

Not every estoppel claim against the Government has a direct economic impact on the treasury.[17] However, government contractors using estoppel against the Government invariably seek some monetary award.[18] Accordingly, the requirement that government employees act within the scope of their authority is a rule rationally related to protecting the public fisc. In particular, under this actual authority requirement, monies can only be obligated pursuant to law and regulation. Therefore, funds from the treasury can be spent but only pursuant to the wishes of Congress. Moreover, Congress can amend the laws when it desires to limit or increase expenditures if necessary.

Protecting the public fisc, however, is a weak rationale because it presupposes that the treasury might be depleted if equitable estoppel could be asserted against the Government when government employees acted without actual authority. In reality, such concerns are unfounded given our nation's reserves and the expenditures which would likely ensue if the Government were estopped more often. Indeed, it seems highly unlikely that the treasury would be even marginally affected given the significant disbursements already occurring within the Government. Yet, despite this realism, some contemporary commentators continue to caution us not to underestimate the public fisc concern.[19]

Protecting the public fisc, however, only suggests the more fundamental reason behind the actual authority rule--preservation of the separation of powers between the executive and legislative branches. This concern is truly a legitimate justification since it raises important constitutional issues not present when purely private parties utilize equitable estoppel. One commentator addressing this issue has noted:

> Administrators are clothed with authority to act and make rules by the exercise of legislative powers; and such legislative power is exercisable only by Congress. It cannot be exercised by an administrator; no administrator may do that which is forbidden, nor exercise a power that was withheld. The fact that a citizen was injured by his action does not clothe an administrator with legislative power, i.e., with the power to assume an authority that has been withheld or prohibited.[20]

Several courts have also stressed the need for restricting the use of estoppel against the Government due to the separation of powers concern. The court in Portmann v. United States[21] expressed their concern as follows:

> [P]ermitting equitable estoppel[based on unauthorized conduct] against the government would, in effect, allow government employees to "legislate" by misinterpreting or ignoring an applicable statute or regulation. Judicial validation of such unauthorized "legislation", it was claimed would infrnge upon Congress' exclusive constitutional authority to make law.[22]

Additionally, the requirement for actual authority is enforced not just to protect the public fisc, but to ensure compliance with other important public policies.[23] Thus, the requirement for actual authority ensures that the laws that Congress passes under Article I of the U.S. Constitution which might be intentionally or unintentionally disregarded by government employees are not indirectly undermined through the application of equitable estoppel. In government contracting it ensures that contract payments are not illegally made in violation of Article IV, Section 3, Clause 2 of the Constitution.[24]

Courts have also utilized the actual authority rule to protect the Government from collusive suits resulting from improper arrangements between government agents and persons dealing with the Government.[25] Another reason often raised is the need to ensure that the interest of the citizenry as a whole in obedience to the law is not undermined[26] Finally, some courts have accepted the proposition that the Government must rely more heavily on its agents, yet it often does not have the firm control of its agents that the private sector does.[27] All of these reasons, some more compelling than others, have perpetuated the actual authority requirement.

B. Scope of Authority

Given the continued vitality of the actual authority rule as outlined above, anyone seeking to determine when the Government can be equitably estopped must have an understanding of the phrase "scope of authority".

1. Express Authority

Under the traditional rule as expressed above, government employees must act with actual authority for the Government to be equitably estopped. Actual authority can perhaps best be considered as the power of an agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him.[29] These manifestations of consent or directions from the principal to the agent are often expressly given to the agent, either orally or in writing. In such circumstances government agents act with express authority. For example, the Federal Acquisition Regulation(FAR) provides agency heads with express authority which in turn may be delegated:

> Authority and responsibility to contract for authorized supplies and services are vested in the agency head. The agency head may establish contracting activities and delegate to heads of such contracting activities broad authority to

> manage the agency's contracting functions. Contracts may be entered into and signed on behalf of the Government only by contracting officers.[29]

Another example of express authority is the contracting officer's Warrant or Certificate of Appointment which expressly specifies any limitations on the scope of his authority, other than those limits found in applicable statutes and regulations.

Quite often, a government employee's express authority will be outlined in the statutes and implementing regulations governing the particular transaction. However, in-house directives and guidance also provide an employee with express authority.

2. Implied Authority

Perhaps more often, though, government employees act with implied authority. This is simply because it would be nearly impossible for the Government to precisely detail what each employee is required to do in his job every day. Implied authority is also actual authority and therefore its exercise by government employees permits the Government to be estopped. Implied authority is normally considered to be the power which is naturally or necessarily incidental to the exercise of delegated authority even though not expressly delegated.[30]

The Claims Court's decision in People's Bank & Trust Co. v. United States[31] illustrates the concept of implied authority. At issue was whether Farmers Home Administration(FmHA) government employees had authority to enter into a contract with a bank to guarantee repayment of certain proceeds loaned to a farming couple by the bank. The court found no FmHA regulations, policy directives, internal memoranda, or training manuals which prohibited the repayment agreement. Moreover, the FmHA employees who consummated the deal clearly acted as if they had the requisite authority. Yet, there was also nothing that expressly authorized the particular transaction. While not explicitly using the term implied authority, the court apparently relied on it in reaching its decision. The court noted:

> Since there is no prohibition to this practice contained in any statute, regulation, or internal policy manual or directive, and taking into consideration the broad powers the FmHA granted to its county officials to carry out their loan-making functions, this Court finds and determines that the various county offices(and officials) within the FmHA had the actual authority, under the regulations existing in 1981, to enter into contracts with commercial lenders to guarantee the repayment of interim financing granted to FmHA rural applicants.[32]

Contracting officer representatives(COTR) often act with implied authority in their dealings with contractors. For example, in DOT Systems, Inc.,[33] the board stated:

> However, as we point out below, the fact that the COTR had neither actual[express] nor apparent authority to bind the Government does not necessarily preclude the granting of relief under the circumstances as here exist. Rather, such authority may be implied when considered an integral part of specific duties assigned to a

government employee....[34]

C. Apparent Authority

Under the law of agency, an agent acting without actual authority can also bind his principal. In such cases the agent is considered to have "apparent authority". Apparent authority has been defined as "the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons."[35]

Apparent authority underlies the objective theory of contracts. Specifically, a principal may be bound by the words or conduct he manifests to a third party even if the agent has insufficient or no actual authority because of undisclosed limitations placed on the agent's authority. Thus, the power to bind a principal resulting from apparent authority may be lesser, the same, or greater than that resulting from actual authority in any particular case.[36] Moreover, apparent authority is quite different from implied authority. One board expressed its views as follows:

> In order for the Government to be bound by the action of its agent, that agent must possess the actual authority to take the action. The Government is not bound under the doctrine of apparent authority. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380(1947). Actual authority may be either express, clearly set forth in the delegation, or implied, reasonably interpreted

from the express delegation.[37]

Indeed, the term apparent authority is arguably a misnomer since agents exercising it have power to bind their principal but not necessarily authority. Moreover, apparent authority bears little relation to implied authority:

> [A]pparent authority has an entirely different meaning from inferred or implied authority. The latter terms are merely descriptive of the way in which authority is created, whereas apparent authority is not necessarily coincidental with authority.[38]

It is essential to note that with apparent authority the manifestation of an agent's authority runs directly to the third party and not to the agent as it does with actual authority. Moreover, apparent authority exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized.[39] When published regulations limit an agent's authority, contractors dealing with the Government cannot reasonably rely on conduct or statements from the agents themselves since the contractors are presumed to know the content of these regulations. Indeed, one court recently refused to estop the Government based on an agent's purported apparent authority because there was a published regulation limiting the agent's authority. In its discussion the court noted:

> It would be anomalous for the court to find that an agent possesses apparent authority merely because the agent states that he has this authority. Such a holding would render meaningless the protections afforded by 28 C.F.R. Section 0.160-61.[40]

Despite their close relationship, apparent authority and equitable estoppel are not identical concepts.[41] In purely commercial contracts where the Government is not a party, a party can be equitably estopped based on his agent's apparent authority.[42] However, in government contracts, employees must act with actual authority for estoppel to be applied against the Government.[43] Apparent authority does not exist in most government contract cases because it only applies when contractors reasonably believe that an agent has authority. As noted earlier, contractors cannot normally form such a reasonable belief because they are deemed to have constructive knowledge of the limitations on an agent's actual authority as expressed in relevant statutes and properly promulgated regulations. One commentator has elaborated on this point:

> In interpretation of authority to act on behalf of the Government, however, the doctrine has become deeply rooted that neither the doctrine of apparent authority nor of estoppel[estoppel based on unauthorized employee conduct] has any application. The logic of the position is elementary. Apparent authority and estoppel must both be predicated on a reliance by the party asserting the right. The authority of a public agent or cfficer must be found in a public statute or a proper delegation pursuant thereto. Since all persons are "presumed to know the law," or to have offical notice of its content, no one is justified in reliance on any appearance or representation of authority to act for the Government contrary to that which is contained in the law itself.[44]

While the doctrine of apparent authority cannot be used to estop the Government, some courts have tried to mitigate this sometimes harsh rule by liberally construing an agent's actual authority. Both the Claims Court and the Federal Circuit Court of Appeals have done this on occasion.

In Broad Avenue Laundry and Tailoring v. United States,[45] the Government awarded a fixed price contract in which the contractor operated a Government owned laundry service facility at Fort Rucker,Alabama. The contractor succeeded a previous contractor and inherited some of the latter's labor force in the process. Shortly after performance started on the new contract the employees elected a new union representative. Through bargaining, the union representative was able to secure an agreement for higher wage rates. A question arose as to whether the higher wages could be incorporated into the existing contract with the Government. The contracting officer(CO) incorrectly advised the contractor and union representative that if the Department of Labor(DOL) issued a new prevailing wage determination as a result of the new agreement, she would automatically include it in the contract and that the contractor could request a price adjustment for the price increase. Subsequently, the CO incorporated the higher wages into the existing contract as a modification. However, much to everyone's chagrin, the CO misinterpreted the applicable Code of Federal Regulation[46] which provided that the wage determination conducted was only valid for contracts not already awarded at the time of the redetermination.

In addressing the contractor's claim for a price adjustment under the contract disputes clause, the board relied on Merrill and the rule that the Government is not estopped when officials act outside the scope of their authority. The board reasoned that the Government could not be estopped becuase the CO had violated regulations having the force and effect of law. The Claims Court, however, estopped the Government and held that the contractor was entitled to a price adjustment. The court determined that on the facts before them that the CO's mistake in interpreting federal regulations was one of law and therefore within her scope of authority. In justifying its decision, the court equated misinterpretations of published agency regulations with mistaken contract orders.

The validity of this decision is questionable in my mind given Supreme Court precedent. Specifically, the estoppel in Broad Avenue Laundry and Tailoring had the effect of allowing a federal regulation to be violated. Such a result seems at odds with the Supreme Court's precept that statutes and regulations are "binding on all who [seek] to" contract with the United States.[46] The Court of Claims earlier recognized this point in Airmotive Engineering Corp. v. United States[47] which involved a misinterpretation of the Renegotiation Act. In this case the court said:

> The United States is not estopped to deny the authority of its agents...one who deals with the Government assumes the risk that the officials with whom he deals have no authority...[p]lainly, the authority to develop Renegotiation policy

resides in the Renegotiation Board and the courts, not in the Department of Defense. Plaintiff was, therefore, not entitled to rely on the unauthorized interpretations of the Act by DOD officials...[o]ne who relies upon a legal interpretation by a Government official assumes the risk that it is in error.[48]

The Supreme Court has made it clear that the burden to ascertain an agent's authority is on the person contracting with the government.[49] It naturally follows that such persons assume the risk of improper statutory or regulatory interpretation. Moreover, it is also clear that the Government cannot be estopped when the estoppel would result in the violation of a statute or regulation.[50] Under Supreme Court precedent, it does not matter whether the statute or regulation was ignored, overlooked, or merely misinterpreted because the final result is the same in each case:non-adherence to congressional directives. The Ninth Circuit Court of Appeals underlied the threat such a rule would have on the principle of separation of powers when it said:

> [T]he tendency against Government estoppel is particulary strong where the official's conduct involves questions of essentially legislative significance, as where he conveys a false impression of the laws of the country. Obviously, Congress' legislative authority should not be readily subordinated to the action of a wayward or unknowledgeable administrative official.[51]

Nonetheless, the Claim's Court did significantly limit the breadth of its decision by stating:

> Of course, this cannot be carried too far. The orders must be within the officer's subject matter jurisdiction...[t]he order must not be contrary to any express authority limitation. The

> government could give the contracting officer a writing, saying she is not authorized to make mistakes of law, but only correct rulings...[t]he order must not call on the contractor to do something illegal...[t]he order must be an order.[52]

The decision in Broad Avenue Laundry & Tailoring should be distinguished from another recent case which also arguably included a mistake of law.

In USA Petroleum Corp. v. United States,[53] a contractor had entered into a contract with the Defense Fuel Supply Center(DFSC) of the Department of Defense in October 1980 to supply approximately two million barrels of Alaskan crude oil to the Government's strategic oil reserve facility in Louisana. Payment under the contract was based on quantities delivered. Moreover, the Government used "strapping tables" to determine the actual quantities delivered. The strapping tables were supplied by the DFSC and entirely within their control although provided to the Government by a subcontractor. Unfortunately, the tables were inaccurate. This caused the Government to pay for more oil than it actually received. Accordingly, the Government sought a refund from USA Petroleum in the amount of $364,948.03.

The court found that the Government had breached its implied warranty of specifications by using the defective strapping table. While recognizing that there is a strong governmental interest in recovering misspent public funds, the Court nevertheless upheld USA Petroleum's estoppel argument against the Government. The court analogized the case to the case of Broad Avenue Laundry & Tailoring. The Court opined:

> The Court in Broad Avenue Laundry, after holding that the contracting officer responsible for the erroneous modification had acted within the scope of her authority, was not bound by decisions such as Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380(1947), holding the government not bound by official speech outside the scope of the speaker's authority...The court, in concluding that the government was estopped from denying the claim involved in Broad Avenue Laundry, essentially concluded that the government may not deny responsibility for its own error in contracting where the contractor acts reasonably and complies completely with the terms of the contract....[t]he case at hand is quite similiar. USA Petroleum complied with the contract terms which foisted upon it the defective strapping tables provided by the government...[i]t was a question of mistaken enforcement of the government's contract rights. We follow Broad Avenue Laundry and conclude that the government is estopped from denying USA Petroleum's claim.[54]

While the court cited Broad Avenue Laundry & Tailoring as authority for its decision, no statute or regulation with the force and effect of law was apparently violated in USA Petroleum Corp. Thus, the court's decision in USA Petroleum is less suspect in my opinion. Instead, the case seems to stand for the proposition that not every mistake made by government officials is outside their scope of authority. This is sensible since surely one should be entitled to make some mistakes yet still act within the scope of his or her authority.[55] Other decisions seem to recognize this distinction. One board recently said:

> [T]here...[is] no such thing as apparent authority as concerns contracting officers and other Government procurement officials...[but] [r]ecent pronouncents of our appellate court indicate that the Government may not avoid an

improvident bargain struck by a contracting officer simply by demonstrating that the bargain is improvident.[56]

There may, however, be one area where apparent authority may still be used to estop the Government without violating Supreme Court precedent. In particular, the Government was recently estopped from disavowing a contract modification when government agents violated an unpublished(i.e. not published in the Federal Register) regulation and therefore acted without actual authority.

Specifically, in New England Tank Industries of New Hampshire,Inc.,[57] the board had to decide whether the Government could retract an option it had exercised based on the fact that a Department of Defense Directive(DODD) limiting the use of "stock funds" was violated by government employees in the process. Of critical import to the board's decision was the fact that the DODD at issue was not published in the Federal Register.

The board initially pointed out that not all agency regulations are equivalent to statutes such that third parties dealing with the Government are deemed to have constructive knowledge of them. The board cited 44 U.S.C. 1507 and 5 U.S.C. Section 552(a)(1) for the proposition that material required to be published in the Federal Register yet not so published may not adversely affect a person without actual knowledge of it. Accordingly, the board felt the duty imposed on contractors to inform themselves about an agent's authority first expressed in

Merrill only exists as to limits on authority properly published in the Federal Register. The board expressed their views as follows:

> [T]he decision in Federal Crop turns on the adequacy of notice of limitations on an agent's authority. The Court's holding comports neatly with the common law agency principle that a third person, having "notice of a limitation of an agent's authority[,] cannot subject the principal to liability if he should know that the agent is acting improperly...[o]n the other hand, when agency rules or other documents limiting the authority of officers and employees of the agency are not published in the Federal Register, the limitations contained therein amount to undisclosed or secret instructions to the agents. In the private sector, one consequence of an agent's violation of such secret instructions is that: [a]...principal authorizing an agent to make a contract, but imposing upon him limitations as to incidental terms not to be revealed, is subject to liability upon a contract made in violation of such limitations with a third person who has no notice of them....[38]

The board concluded that both the Government and the contractor were unconditionally bound by the option agreement. There is no disagreement over the fact that the government employees acted without authority. The board said:

> [D]oD Directive 7420.1 limited DFSC's authority to use a certain pot of money, the stock fund, to finance fuel storage services performed after fiscal year 1975 and instructed DFSC to resort thereafter to a different pot of funds, O&M money. This is the same as if the principal instructed its agent not to use the Master Card for a specific, authorized purchase and, instead, to use the American Express card. The agent, DFSC, left home without the American Express card, but found an abundant balance available in the Master Card account, which it proceeded to use to effect the purchase.[39]

Thus, although the board did not expressly base their decision on apparent authority, since the government agents acted without actual authority and their actions were not properly ratified, only apparent authority could have been used to bind the Government in this case.

The board's decision, however, marks a departure from earlier decisions. Specifically, in Newman v. United States[60] a contractor, Newman, entered into an agreement with certain Army officials to transport aviation gasoline at currently existing rail rates. Due to a mistake, Newman was paid less than the agreed upon rail rates. The Court of Claims, however, would not enforce the agreement because Army Regulation 55-105 had not been satisfied. Specifically, Army Regulation 55-105 assigned the responsibility for determining rail rates with the Chief of Transportation for the Army and this individual had not agreed to the higher rail rates. Army Regulation 55-105 was apparently not published in the Federal Register and thus not readily available to Newman. Moreover, Newman claimed to have no actual knowledge of the regulation.

Nevertheless, the court found against Newman because the government agents violated an Army regulation and therfore lacked actual authority. The court cited Merrill for the proposition that: "he who enters into an agreement with the Government takes the risk that those who purport to act for the Government have the authority to do so."[61]

Additionally, the Claims Court has cited Whiteside v. United States[62] with apparent approval. The facts in Whiteside also involved apparently unpublished regulations.

The regulations limited the authority of persons to enter into contracts on behalf of the Treasury Department. Yet, the Court refused to estop the Government because the regulations had been violated. One commentator has said of these cases:

> Certainly it would seem that the ready availability for general public reference of executive regulations or, indeed, the fact of constructive notice through publication in the <u>Federal Register</u> are not controlling or even important considerations in the resolution of these cases. Rather it is the imposition of the duty, or the passing of the risk to the contractor to identify the limitation on an agent's authority, in which the feasibility of meeting this burden is not a factor the courts consider. In practical terms, of course, this means that the agent must <u>actually</u> have authority to perform the particular act in question in order to obligate the Government. This is so whether the contractor or the agent himself knows the limitations or is able to determine them. Whatever inferences may be made from the <u>Newman</u> decision, it is clear that the Merrill case has been relied on as holding that apparent authority will not apply nor estoppel lie against the United States, and is often referred to among the bar as absolute authority to that effect.[63]

D. Affirmative Misconduct

As indicated above, numerous courts and boards have estopped the Government when its agents have acted with actual authority.[64] On the other hand, numerous courts, including the Supreme Court, have never estopped the Government when its agents have acted without actual authority.[65] These decisions are all consistent with the landmark <u>Merrill</u> decision which stands for the proposition that the Government cannot be estopped when its agents act without actual authority.

However, it is also clear that the actual authority requirement has been subjected to a great deal of criticism.[66] In fact, the 5-4 Merrill decision which upheld the actual authority rule is also well known for Justice Jackson's dissenting opinion. Justice Jackson's dissent reflects the view that it is unfair to expect people contracting with the Government in good faith to know every limit on an agent's authority simply because such limits are published in a federal regulation. Justice Jackson's oft quoted statement "It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street"[67] is continually cited by those critical of the actual authority rule. Indeed, in a footnote in Heckler v. Community Health Services of Crawford County,[68] the Supreme Court itself cited Justice Jackson's dissent in Merrill for the proposition that the Government might be estopped(even when government agents act without actual authority) where the interests of citizens in an honest and reliable government outweigh the public's interest that the Government can enforce the law immune from equitable estoppel.

In essence, the criticism continues because the actual authority rule produces harsh results on persons who have dealings, contractual or otherwise, with the Government.

In one case,[69] a couple(the Phelps) contracted for flood insurance in 1974 from the Government through the Federal Emergency Management Agency(FEMA). On Mar 13, 1980, while the policy was in full force and effect, the Phelp's home sustained serious damage as a result of a severe storm. The home was subsequently condemned by a local building inspector.

In trying to collect on the insurance policy, Mr. Phelps spoke with an agent listed on the policy and a claims supervisor from the National Flood Insurance Program. While the contract of insurance expressly required written proof of loss, Mr. Phelps was repeatedly advised by government agents that he did not have to submit written proof. In fact, at no time during the investigation of the loss was Mr. Phelps advised to submit a written claim. The investigation lasted until January 1981.

Ultimately, FEMA denied the claim on the grounds that the loss was outside the coverage of the policy. However, only on appeal was the issue of whether the Government should be estopped from asserting as a defense the Phelp's failure to submit a written proof of loss raised. The court felt obliged to follow the actual authority rule established in Merrill. It stated:

> [R]egardless of the District court's belief that the insured reasonably relied on a positive misrepresentation by FEMA's agent, a belief which we subscribe, we are compelled to hold that in these circumstances estoppel may not be applied against a government agency despite the hardship

> visited upon the insured. Whatever our inclinations may be, they must give way to the admonition that it is "the duty of all courts to observe the conditions defined by Congress for charging the public treasury."[70]

The Supreme Court, however, has implied in numerous decisions subsequent to Merrill that government conduct amounting to affirmative misconduct might be sufficient to estop the United States from asserting the defense that its employees lacked actual authority.[71] Thus, the Court has apparently left the door open for estopping the Government when its agents act without actual authority or an estoppel would result in the violation of a statute or regulation. Judge McKay explained the relevance of affirmative misconduct in a recent case:

> [A]ffirmative misconduct is relevant because the executive branch has a responsibility to prevent government agents from engaging in intentional, reckless, or grossly negligent misconduct. The failure of the executive branch to prevent such misconduct provides grounds for the Courts to surmount the separation of powers barrier and impose equitable estoppel...[W]here [estoppel] is based on an unauthorized act of a government agent, the court should withhold imposition of estoppel if it would result in charging the public treasury against the will of Congress...Nevertheless, equitable estoppel of the government may be permissible, notwithstanding its threat to the goals of Congress, in exceptional circumstances, such as affirmative misconduct of the government.[72]

Nevertheless, the Supreme Court's consistent failure to find affirmative misconduct suggests that estoppel against the Government will probably continue to be granted only when government agents act with actual authority.[73]

The Supreme Court's treatment of affirmative misconduct is instructive for contract practitioners and academicians since several courts and boards of contract appeals have begun to utilize this principle when contractors seek to estop the Government.[74] For example, in Powell A. Casey,[75] the board refused to dismiss a contractor's claim that the Government should be estopped from asserting that its agent lacked authority to enter into the contract at issue. Instead, the board remanded the case for a full hearing on the issue of affirmative misconduct suggesting that the Government might be estopped due to affirmative misconduct even if its agent acted without actual authority. In its analysis, the board cited Urban Data Systems, Inc. v. United States[76] where the Federal Circuit Court of Appeals made the following statement with reference to the Supreme Court's decision in Schweiker v. Hansen[77]:

> The Court suggested that evidence of affirmative misconduct by a government agent might be sufficient to estop the Government from insisting upon compliance with otherwise valid statutes and regulations.[78]

1. Supreme Court Case Law

The notion of affirmative misconduct first surfaced in Montana v. Kennedy.[79] In this case, Montana's(petitioner's) mother, a U.S. citizen, was married to an Italian citizen. Montana was born in Italy in 1906 and returned to the

United States with his mother the same year. Montana lived in the United States from the date of his arrival but never was naturalized as a United States citizen. Having been deported from the United States as an alien, Montana sought a declaratory judgment as to his citizenship.

The Supreme Court upheld the lower court by finding that Montana did not qualify for citizenship under the applicable immigration and naturalization statutes. However, Montana argued that the United States should be equitably estopped from asserting his non-compliance with the applicable statutes because of its own misconduct. Specifically, the evidence suggested that a U.S. consular officer refused to issue Montana's mother a passport in 1906 to return to the United States. The consular officer apparently refused to issue the passport because of the mother's pregnancy. Yet, in fact there was no requirement for a passport to return to the United States in 1906. Thus, Montana's estoppel argument rested on principles of fairness and equity because arguably he would have been born in the United States and acquired United States citizenship but for the officer's improper actions.

The Court ruled against Montana but refused to rule out estoppel of the Government in an appropriate case. Instead, the Court stated only that the officer's potentially well-meant though erroneous advice "falls short of misconduct such as might prevent the United States from relying on petitioner's foreign birth."[illegible]

The next major case in which the Court discussed affirmative misconduct was INS v. Hibi.[81] As in Montana, an alien, Hibi, sought to acquire United States citizenship. Hibi was a Filipino citizen who had served with the U.S. Army during World War II in the Phillipines. As such, Hibi was entitled to special consideration under certain immigration statutes. Unfortunately, Hibi failed to apply for U.S. citizenship before a specified cut-off date and therefore lost his rights under the acts. Nevertheless, Hibi maintained that the United States should be estopped from relying on the statutory time limits because it failed to advise him, during the time he was elgible, of his right to apply for naturalization, and because it failed to provide a naturalization representative in the Phillipines during the period in which he could have applied for citizenship.

In its per curiam decision, the Court once again left open the issue of whether affirmative misconduct by government employees can estop the United States. As in Montana, the Court simply stated that the facts before them did not rise to the level of affirmative misconduct. Without elaborating, the Court stated:

> We do not think that the failure to fully publicize the rights which Congress accorded under the Act of 1940, or the failure to have stationed in the Phillipine Islands during all of the time those rights were available an authorized naturalization representative, can give rise to an estoppel against the Government.[82]

Thus, these two early decisions of the Supreme Court suggest several things. First, affirmative misconduct appears to be a high threshold to satisfy for a person hoping to estop the Government when its employees act without actual authority. Second, innocent misrepresentations and neglect of duty on the part of government employees generally does not appear to constitute affirmative misconduct. Finally, the Court appears reluctant to estop the Government when the effect of an estoppel would cause the Government to violate applicable statutes and regulations.

In the more recent case of Schweiker v. Hansen,[83] the Supreme Court in a per curiam opinion again found no affirmative misconduct on the part of government employees. In this case, an employee of the Social Security Administration erroneously told an applicant for social security benefits that she was not entitled to such benefits. In addition, he failed to recommend to the applicant that she file a written application for benefits. In doing so, the employee violated an internal agency claims manual. The applicant subsequently sought retroactive benefits for which she had not filed a written claim. She argued that the Government should be estopped from asserting in defense to her claim that a published regulation required all requests for benefits to be in writing.

The Supreme Court denied the applicant's estoppel claim citing Merrill with approval. Unfortunately, the Court's analysis only suggests what conduct does not amount to affirmative misconduct. Specifically, the Court noted that the agent's conduct did not cause the applicant to take action, or fail to take action, that she could correct at any time. However, this distinction seems relatively unimportant since the Court did not find affirmative misconduct in Merrill and Montana where the agent's actions did arguably cause an individual to take action or fail to take action which could not be corrected.

The Court also seemed to support its no affirmative misconduct finding on the basis that the agent only violated an internal agency handbook and not a regulation with the force and effect of law. This distinction is particularly interesting because estoppel of the Government was rejected in Merrill precisely because its use would have resulted in the violation of a duly published regulation. Accordingly, allowing estoppel when employees violate published regulations would effectively amount to an overruling of Merrill. Yet, this does not appear to be the intent of the Court since the Court in Hansen expressly reaffirmed it's continued desire to follow Merrill by "observ[ing] the conditions defined by Congress[viz., statutes and published regulations having the force and effect of law] for charging the public treasury."[84] Moreover, since negligent misrepresentations by government employees do not constitute affirmative misconduct,[85] it would appear that only deliberate statutory or regulatory violations could amount to affirmative misconduct.

Finally, the Court seemed to suggest that oral misrepresentations would not amount to affirmative misconduct perhaps because the Government would have difficulty disproving such statements.

In the final analysis, the Court's analysis and statement that "Connelly's errors "fal[l] far short" of conduct which would raise a serious question whether petitioner is estopped from insisting upon compliance with the valid regulation"[86] also fell short of providing meaningful guidance for lower courts on the issue of affimative misconduct.

Unfortunately, the three latest opinions by the Court on estopping the Government also do not shed much light on the subject of affirmative misconduct. In Heckler v. Community Health Services of Crawford County,[87] the Court refused to state that estoppel may not in any circumstances run against the Government when government employees act without actual authority. Instead, the Court opined:

> [W]e are hesitant when it is unnecessary to decide this case, to say that there are no cases in which the public interest in ensuring that the government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with the Government.[88]

Finally, in its two most recent decisions on estoppel,[89] the Court provided no additional guidance on affirmative misconduct although it did reaffirm Merrill.

2. Lower Court Development

Because of the Supreme Court's failure to adequately define affirmative misconduct, several lower courts have taken an active role in developing the concept of affirmative misconduct in estoppel cases. However, at the same time, there continue to be few decisions in which government employee conduct has been considered sufficiently egregious to amount to affirmative misconduct.[90] In effect, this suggests that under present law the Government will probably not be estopped when its agents act without actual authority or the effect of an estoppel would result in a statute or regulation being violated.

A review of the lower court decisional law suggests several things. Perhaps most importantly, it seems clear that negligent misrepresentations or mere error on the part of government employees does not amount to affirmative misconduct.[91] This conclusion will make it particulary difficult for contractors to estop the government when its employees act without actual authority because most employees acting without authority or in violation of regulations or statutes probably do so out of inadvertance or carelessness. Yet, in such cases the Government cannot be estopped from denying the lack of authority of its agents since negligence does not amount to affirmative misconduct.

Affirmative misconduct requires affirmative action. The Ninth Circuit Court of Appeals has said that affirmative misconduct requires a showing of affirmative misrepresentation or affirmative concealment of material facts.[92] Thus, a government employee's silence, failure to respond, or reluctance to be of assistance normally do not constitute affirmative misconduct according to most courts.[93]

Recent decisions by the Claims Court have also failed to find affirmative misconduct on the part of government employees. In _First National Bank of Louisa, Kentucky, v. United States_,[94] a bank sought to enforce a loan guarantee agreement with the Small Business Administration(SBA). The SBA, however, refused to perform since the agreement violated published regulations.

The Claims Court refused to estop the Government from asserting it's lack of authority to enter into such an agreement. Moreover, the court found no affirmative misconduct to justify not adhering to the actual authority requirement. However, the court did suggest that SBA misrepresentations of its own regulations might have produced a different result.

More recently, the Claims Court recognized the principle of affirmative misconduct but indicated that the Government cannot commit affirmative misconduct by asserting the defense of lack of authority to an estoppel claim. Instead, it is the government employees conduct or representations towards a contractor which must amount to affirmative misconduct if at all. Specifically, in Hazeltine Corp. v. United States,[95] a contractor, Hazeltine, claimed that the Government should be estopped from raising a reduction to practice issue with regards to a tuned array or open array antenna. Hazeltine argued that the Government was estopped because of an earlier agreement in which the Government had already agreed that the antenna had been reduced to practice. With regards to the element of affirmative misconduct, the court stated:

> [P]laintiff also must demonstrate affirmative misconduct on the part of government officials in order for equitable estoppel to be applied against the government...Plaintiff's argument in this regard is that "[t]he government has engaged in affirmative misconduct by denying its previous agreement." This "bootstrapping" cannot suffice as it would clearly have the effect of eliminating the affirmative misconduct requirement. Simply put, the government does not engage in affirmative misconduct by challenging the validity of its employee's acts or agreements....[96]

In conclusion, under current law, it appears that contractors will not be able to estop the Government from asserting a claim or defense unless government agents have acted with actual authority. Additionally, estoppel will not be granted if it would result in the violation of a statute or regulation. However, it must be recognized that courts and boards continue to liberally construe a government agent's actual authority perhaps in an effort to mitigate the perceived harshness of the actual authority rule. Also, several courts and boards utilize the affirmative misconduct exception to the actual authority requirement. Yet, at present this exception is of a limited value because several courts, including the Supreme Court, have limited its reach. Nevertheless, contract practitioners and academicians need to closely follow the future development of affirmative misconduct because it still has the potential to undermine the actual authority rule.

Chapter Three Footnotes

1. Utah Power & Light Co. v. United States, 243 U.S. 389,409(1917). See also Maykat Enterprises, GSBCA No. 7346, 84-3 BCA 17510. In its analysis, the board stated:

> There is one ground for avoidance that the Government enjoys as a result of its sovereign status. That ground is a familiar one, and it is that the Government is bound by only those agreements of its agents that are within the scope of their actual authority, as distinguished from their apparent authority, and that are not contrary to statutory requirements or to regulations implementing those statutory requirements.

Id. at 17510.

2. See e.g., Vec-Tor,Inc., ASBCA Nos. 25807,26128, 85-1 BCA 17755, where the board made the following comment: "[L]ack of authority is an absolute bar to applying principles of estoppel...." Id. at 88677; City of Klawock v. United States, 2 Cl.Ct. 580(1983); Toyo Menka Kaisha,Ltd. v. United States, 597 F.2d 1371(Ct.Cl.1979); Atlantic Richfield Co. v. Hickel, 432 F.2d 587(10th Cir.1970)(United States cannot be estopped by the erroneous or unauthorized actions or statements of its agents); Robert P. Lewis,Sr. v. United States, No. 34-78(Ct.Cl.April 26,1982)(unpub.); See also Tri-State Laundry Servs.,Inc., Comp.Gen.Dec. B-218042, 85-1 CPD 295; Comp.Gen.Dec. B-219273,Dec 26,1985,unpub.

3. BudRho Energy Systems,Inc., VABCA No. 2208, 86-1 BCA 18657.

4. Id. at 93839.

5. See e.g., USA Petroleum Corp. v. United States, 821 F.2d 622(Fed. Cir.1987); Federal Deposit Ins.Corp. v. Harrison, 735 F.2d 408(11th Cir.1984); Dana Corp. v. United States, 470 F.2d 1032(Ct.Cl.1972).

6. Manloading & Management Assocs.,Inc. v. United States, 461 F.2d 1299(Ct.Cl.1972).

7. Id. at 1303.

8. Lee v. Munroe, 11 U.S.(7 Cranch) 366(1813).

9. Id. at 369.

10. Utah Power & Light Co. v. United States, 243 U.S. 389(1917).

11. Id. at 391.

12. Federal Crop Ins.Corp. v. Merrill, 332 U.S. 380(1947).

13. See e.g., Lyng v. Payne, 476 U.S. 926,936(1986); Heckler v. Community Health Servs. of Crawford County,Inc., 467 U.S. 51,61,64(1984); Pia v. United States, 7 Cl.Ct. 208(1985); See also Varo,Inc., DOTBCA No. 1695, 87-3 BCA 20199.

14. Federal Crop Ins.Corp. v. Merrill, 332 U.S. at 384.

15. See e.g., Schweiker v. Hansen, 450 U.S. 785(1981). In this case the Court stated: "[I]t is the duty of all courts to observe the conditions defined by Congress for charging the public treasury." Id. at 788. See also Portmann v. United States, 674 F.2d 1155,1167(7th Cir.1982); United States v. Asmar, 827 F.2d 907,912(3rd Cir.1987).

16. Heckler v. Community Health Servs. of Crawford County, 467 U.S. 51,63(1984).

17. See e.g., Federal Deposit Ins.Corp. v. Harrison, 735 F.2d 408,412(11th Cir.1984). The court indicated that profits and losses of the Federal Deposit Insurance Corporation are neither received nor absorbed by the United States.

18. See e.g., USA Petroleum Corp. v. United States, 821 F.2d 622(Fed. Cir.1987).

19. Ansell, Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government, 53 Univ.Chi.L.Rev. 1026,1034(1986).

20. Berger, Estoppel Against the Government, 21 Univ.Chi.L.Rev. 680,686(1959).

21. Portmann v. United States, 674 F.2d 1155(7th Cir.1982).

22. Id. at 1159.

23. See e.g., INS v. Miranda, 459 U.S. 14(1982)(per curiam) where the Court said:

> The final distinction drawn by the Court of Appeals between this case and Hansen is unpersuasive. It is true that Hansen relied on a line of cases involving claims against the public treasury. But there was no indication that the Government would be estopped in the absence of the potential burden on the fisc. An increasingly important interest, implicating matters of broad public concern, is involved in cases of this kind. Enforcing the immigration laws, and the conditions for residency in this country, is becoming more difficult.

Id. at 18,19.

24. See Fansteel Metallurgical Corp. v. United States, 172 F.Supp. 268(Ct.Cl.1959); Aetna Casualty & Surety Co. v. United States, 526 F.2d 1127(Ct.Cl.1975), cert.denied, 425 U.S. 973(1976).

25. See Phelps v. FEMA, 785 F.2d 13(1986). In this case the court stated: "In a complex government with thousands of agencies...there is a very real need to protect the Government against binding commitments by improper conduct of its agents, which might promote fraud or collusion." Id. at 17.

26. Chien-Shih Wang v. INS, 823 F.2d 1273,1276(8th Cir.1987); Heckler v. Community Health Servs. of Crawford County, 467 U.S. 51,60(1984).

27. California Pacific Bank v. SBA, 557 F.2d 218,224(1977).

28. Restatement(Second) Agency Section 7(1958).

29. 48 CFR 1.601(1988).

30. Branch Banking & Trust Co. v. United States, 98 F.Supp. 757,766(Ct.Cl.1951), cert.denied, 342 U.S. 893(1951).

31. People's Bank & Trust Co. v. United States, 11 Cl.Ct. 554(1987).

32. Id. at 554.

33. DOT Systems,Inc., DOTCAB No. 1208, 82-2 BCA 15817. See also Rust Consulting Group, LBCA No. 82-BCA-34, 84-1 BCA 17070.

34. Id. at 78386.

35. Restatement(Second) Agency Section 8(1958).

36. Id. at 30-35.

37. Southwest Marine of San Francisco,Inc., ASBCA No. 29953, 87-3 BCA 20003.

38. Restatement(Second) Agency Section 8, comment e(1958).

39. Id. at 30-31.

40. White v. United States, 639 F.Supp. 82(M.D.Pa.1986), aff'd 815 F.2d 697(3rd Cir.1987).

41. Restatement(Second) Agency Section 8(1958). In comment d it states:

> Like apparent authority, it[equitable estoppel] is based on the idea that one should be bound by what he manifests irrespective of fault; but it operates only to compensate for loss to those relying upon the words and not to create rights in the speaker...Thus, when a writing is required to authorize an agent to sell land and the agent was authorized only orally, but the principal tells the third person that the agent was authorized, there is no apparent authority, but the principal would be estopped from denying it.

Id. at 33. See also J.Hynes, Agency & Partnership, Chapter 4(2ed.1974); White v. United States, 639 F.Supp 82(M.D.Penn.1986).

42. See 3 Am.Jur. 2d Agency Section 78(1986).

43. Tymshare, PSBCA No. 206, 76-2 BCA 12218; Pia v. United States, 7 Cl.Ct. 208(1985)(agency law doctrine of apparent authority inapplicable to United States); Bromley Contracting Co.,Inc. v. United States, 14 Cl.Ct. 69,79(1987); Federal Crop Ins.Corp. v. Merrill, 332 U.S. 380(1947). But see Whike Constr.Co. v. United States, 140 F.Supp. 560(Ct.Cl.1956); Savoy Constr.Co.,Inc., ENGBCA No. 4104, 83-2 BCA 16655; however, in M.A. Mortenson Co., ENGBCA No. 4780, 87-2 BCA 19718, the Corp of Engineers Board of Contract Appeals suggested that persons cannot estop the Government through the apparent authority of its agents. Thus, the board apparently overruled its prior decision in Savoy.

44. McIntire, Authority of Government Contracting Officers: Estoppel and Apparent Authority, 25 Geo.Wash.L.Rev. 162,164(1955). See also Atlantic Gulf & Pacific Co., No. 240-73(Ct.Cl.1975)(unpub.).

45. Broad Ave. Laundry & Tailoring v. United States, 681 F.2d 746(Ct.Cl.1982), aff'd on other grounds, 693 F.2d 1387(Fed.Cir.1982).

46. Federal Crop Ins.Corp. v. Merrill, 332 U.S. 380,385(1947).

47. Airmotive Eng'g Corp. v. United States, 535 F.2d 8(Ct.Cl.1976).

48. Id. at 11.

49. See e.g., Lyng v. Payne, 476 U.S. 926(1986); Federal Crop Ins.Corp. v. Merrill, 332 U.S. at 384.

50. See e.g., Utah Power & Light Co. v. United States, 243 U.S. 389(1917). In this case the Court made the following oft quoted statement: "[T]he United States is neither bound nor estopped by acts of its officers or agents in entering

into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." Id. at 391. In Schweiker v. Hansen, 450 U.S. 785(1981)(per curiam), the Court refused to estop the Government because such a result would have allowed the respondent to receive social security benefits without ever having submitted a written application as required by law. See also Augusta Aviation,Inc. v. United States, 671 F.2d 445,448,449(11th Cir.1982).

51. Schuster v. INS, 312 F.2d 311,317(9th Cir.1962).

52. Broad Ave. Laundry & Tailoring v. United States, 681 F.2d 746,749(Ct.Cl.1982), aff'd on other grounds, 693 F.2d 1387(Fed Cir.1982).

53. USA Petroleum Corp. v. United States, 821 F.2d 622(Fed.Cir.1987).

54. Id. at 626,627.

55. See e.g., Liberty Coat Co., ASBCA No. 4119. 57-2 BCA 1576; Cooke v. United States, 91 U.S. 389(1875); Miller v. United States, 500 F.2d 1007,1010(2d Cir.1974).

56. Florida East Coast Properties,Inc., 86-3 BCA 19070 at 96320.

57. New England Tank Indus. of New Hampshire,Inc., ASBCA No. 26474, 88-1 BCA 20395.

58. Id. at 103171.

59. Id. at 103173.

60. Newman v, United States, 135 F.Supp. 953(Ct.Cl.1955).

61. Federal Crop Ins.Corp. v. Merrill, 332 U.S. 380(1947).

62. Whiteside v. United States, 93 U.S. 247,250(1876).

63. Comment, Government Contracts: Apparent Authority and Estoppel, 55 Geo.L.J. 830,838(1966)(emphasis added).

64. See note 5 and accompanying text supra.

65. See note 2 and accompanying text supra. Some courts, however, have identified Moser v. United States, 341 U.S. 41(1951) as an exception to this rule. In Moser, the Court held that a S·iss national, Moser, could not be denied U.S. citizenship since he had relied on U.S. Government employee misrepresentations. However, while the facts clearly supported an estoppel, the Court expressly declined to decide the case on estoppel grounds.

66. Comment, _Emergence of an Equitable Doctrine of Estoppel Against the Government-The Oil Shale Cases,_ 46 Univ.Colo.L.Rev. 433(1974); Comment, _Government Contracts: Apparent Authority & Estoppel,_ 55 Geo.L.J. 830(1966); _Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government,_ 53 Univ.Chi.L.Rev. 1026(1986).

67. Federal Crop Ins.Corp. v. Merrill, 332 U.S. 380,386(1947)(Jackson,J., dissenting).

68. Heckler v. Community Helath Servs. of Crawford County, 467 U.S. 51,61(1984).

69. _See_ Phelps v. FEMA, 785 F.2d 13(1st Cir.1986).

70. _Id._ at 19(emphasis added).

71. _See_ text accompanying notes 79-88 _infra_.

72. Home Savings & Loan Assoc. of Lawton,Okla. v. Nimmo, 695 F.2d 1251,1261(10th Cir.1982)(McKay, dissenting). _See also_ Raines v. United States, 12 Cl.Ct. 530(1987).

73. _See_ text accompanying notes 79-88 _infra_. One court has suggested that for estoppel to be applied against the Government, the employees conduct must be within the scope of his authority and be an affirmative act., which amounts to unconscientious or inequitable behavior. Tosco Corp. v. Hodel, 611 F.Supp. 1130(D.C.Colo.1985). This view, however, seems odd since most courts view affirmative misconduct as a vehicle to estop the Government when its agents act without actual authority.

74. _See e.g.,_ People's Bank & Trust Co. v. United States, 7 Cl.Ct. 665(1985) where the court stated:

> [E]ven if it is determined that neither the FmHA EELS nor the FmHA County Supervisor possessed the actual authority to contract with the plaintiff in this case, it is possible that this Court couold find, after a thorough airing of the facts in this case, that the Government should be equitably estopped to deny its lack of authority. Such a determination depends upon whether the Government's actions constitute "_affirmative misconduct_"(emphasis added).

_Id._ at 668,669; _See also_ California Pacific Bank v. Small Business Administration, 557 F.2d 218(9th Cir.1977) where the court stated: "[T]o estop the government from raising the defense of [contract] illegality one must demonstrate that the agent's action constituted "affirmative misconduct." _Id._ at 224; First Nat'l Bank of Louisa Kentucky v. United States, 6 Cl.Ct. 241(1984); Liberty Nat'l Bank v. United States, 7 Cl.Ct. 670(1985); Raines v. United States, 12 Cl.Ct. 530(1987)(finding no affirmative

misconduct on the facts before them but holding that a showing of affirmative misconduct can estop the Government from raising the Merrill defense of lack of authority).

75. Powell A. Casey, IBCA No. 1638-11-82, 83-1 BCA 16538.

76. Urban Data Systems,Inc. v. United States, 699 F.2d 1147(Fed.Cir.1983).

77. Schweiker v, Hansen, 450 U.S. 785(1981)(per curiam).

78. Urban Data Systems,Inc. v. United States, 699 F.2d 1147,1154(Fed Cir.1983).

79. Mont. v. Kennedy, 366 U.S. 308(1961).

80. Id. at 314315.

81. INS v. Hibi, 414 U.S. 5(1973)(per curiam).

82. Id. at 8,9.

83. Schweiker v. Hansen, 450 U.S. 785(1981)(per curiam).

84. Federal Crop Ins.Corp. v. Merrill, 332 U.S. 380,385(1947).

85. See e.g., Montana v. Kennedy, 366 U.S. 308(1961); Schweiker v. Hansen, 450 U.S. 785(1981)(per curiam).

86. Schweiker v. Hansen, 450 U.S. at 790.

87. Heckler v. Community Health Servs. of Crawford County, 467 U.S. 51(1984).

88. Id. at 60,61.

89. See United States v. Locke, 471 U.S. 84(1985); Lyng v. Payne, 476 U.S. 926(1986).

90. See e.g., Corniel-Rodriguez v. INS, 532 F.2d 301(2d Cir.1976); United States v. Manning, 787 F.2d 431(8th Cir.1986); McDonald v. Schweiker, 537 F.Supp. 47(N.D.Ind.1981).

91. See e.g., TRW,Inc., v. FTC, 647 F.2d 942,951(9th Cir.1981)(affirmative misconduct is more than negligence); United States v. Ven-Fuel,Inc., 758 F.2d 741,761(1985); United States v. Repass, 688 F.2d 154(2d Cir.1982).

92. See e.g., United States v. Ruby, 588 F.2d 697,703,704(1978); Grumann Ohio Corp. v. Dole, 776 F.2d 338(D.C.Cir.1985).

93. See e.g., Lavin v. Marsh, 644 F.2d 1378,1384(9th

Cir.1981); Schweiker v. Hansen, 450 U.S. 785(1981); Sederquist v. Tahoe Regional Planning Agency, 652 F.Supp. 341,347(D.Nev.1987).

94. First Nat'l Bank of Louisa,Kentucky v. United States, 6 Cl.Ct. 241(1984).

95. Hazeltine Corp. v. United States, 10 Cl.Ct. 417(1986), aff'd 820 F.2d 1190(Fed.Cir.1987).

96. Id. at 444.

IV. Conclusion

The doctrine of equitable estoppel possesses a rich and varied history. Equitable estoppel is an outgrowth of several earlier forms of estoppel. These earlier types of estoppel included estoppel by record, estoppel by deed, and estoppel in pais. Eventually, estoppel evolved into the modern doctrine of equitable estoppel. However, unlike its close relative promissory estoppel, equitable estoppel is not used to create a cause of action. Instead, equitable estoppel is utilized as a litigative device to prevent a party from asserting a claim or defense. Equitable estoppel is based on principles of justice and fair dealing. Moreover, the elements of equitable estoppel distinguish it from the principles of ratification and finality although all three principles can be used to bind the Government.

To establish a prima facie case of equitable estoppel against the United States, a party must first prove four basic elements: 1) the Government must know the facts; 2) the Government must intend that its conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; 3) the party asserting the estoppel must be ignorant of the true facts and finally, 4) the party asserting the estoppel must reasonably rely on the Government's conduct to its detriment or injury.

Although an issue often arises as to whether the

United States can be equitably estopped in view of its sovereign status, it seems clear that government contractors can successfully invoke equitable estoppel against the Government. This is true whether a court employs in its analysis a sovereign/proprietary approach or a balancing test. The sovereign/proprietary distinction stems from the notion that the Government should be treated like a private party when it enters the commercial domain. Accordingly, estoppel is appropriate when the Government acts in its proprietary capacity. On the other hand, under the balancing test, courts weigh the competing interests at stake before deciding whether to estop the Government from asserting a defense or claim. However, these two separately labeled approaches are not fundamentally distinct. Indeed, courts and boards using the balancing approach in estoppel cases still continue to consider whether the Government acted in a sovereign or proprietary capacity. In fact, their determination on whether the Government acted in a sovereign or proprietary capacity is a significant factor in their balancing calculus. Accordingly, government contractors can successfully assert equitable estoppel against the Government under either approach because it is generally understood and accepted that the Government acts in its proprietary capacity when it enters into contracts with contractors.

Finally, courts and boards will generally not estop the United States when its agents have acted without actual authority or when the effect of an estoppel would result in the violation of a statute or published regulation. Moreover, apparent authority will normally not be applied against the Government because contractors are expected to know the limits of an agent's authority as expressed in relevant statutes and properly promulgated regulations. Nevertheless, because of the perceived harshness of the actual authority rule, several courts and boards are likely to liberally construe a government employee's actual authority and therefore allow the United States to be potentially estopped from asserting a defense or claim. Finally, affirmative misconduct on the part of government employees might allow the Government to be equitably estopped from asserting a claim or defense even when its employees have acted without actual authority or the effect of the estoppel would result in the violation of a statute or regulation. However, at present this eventuality is unlikely because numerous courts and boards, including the Supreme Court, have failed to find affirmative misconduct in estoppel cases that have come before them.